Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

BURLINGTON AIR EXPRESS, INC.,

Petitioner,

v.

LITE-ON PERIPHERALS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a suit by one who possesses a negotiable document of title that runs to the order of another person and has not been negotiated by indorsement, is it a federal-law or a state-law rule of decision that governs title to the goods?

2. If the state's rule of decision governs title to the goods described in a document of title, was there any basis for federal subject-matter jurisdiction?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Burlington Air Express, Inc. changed its name during the pendency of this litigation to BAX Global Inc. BAX Global Inc. is a wholly-owned subsidiary of The Pittston Company, a publicly-traded Virginia corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Air Express, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BE' OW

The court of appeals' opinion (per Trott, J., joined by Hug & W. Fletcher, JJ.) (Pet. App. 1-13) is reported at 255 F.3d 1189. The court of appeals' order directing the respondent to respond to Burlington's petition for rehearing and suggestion for rehearing en banc (Pet. App. at 22-23), and the court of appeals' subsequent order denying the petition for rehearing and suggestion for rehearing en banc (*id.* at 24-25) are not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 10, 2001, and denied rehearing and rehearing en banc on August 31, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns whether the federal courts may create federal common law to override uniform state laws that are embodied in state commercial-law statutes. The resulting questions of federalism and comity indicate consideration of the meaning and application of article I,

section 8 and the tenth amendment of the Constitution. If this action is not governed by federal common law, it is questionable whether the district court had power to decide the case under article III, section 2, clause 1 of the Constitution and whether it had subject-matter jurisdiction under 28 U.S.C. § 1337, the basis of jurisdiction asserted below, or under 28 U.S.C. § 1331, which was not asserted below. These constitutional and statutory provisions are reproduced in the Appendix at App. 26.

STATEMENT OF THE CASE

1. Petitioner Burlington is an international freight forwarder and ocean transportation intermediary based in Irvine, California. The services it provides include the transportation of goods for its customers in the United States. Petitioner provides transportation by several means, including by air in its own aircraft or via other air common carriers, and by sea via vessel-operating common carriers. Petitioner is licensed by the Federal Maritime Commission as an ocean transportation intermediary, and is subject to regulation by the Commission under the Shipping Act of 1984. *See* 46 U.S.C. app. § 1718.

2. Respondent is a California-based corporation engaged in the computer-hardware business, and is a wholly-owned subsidiary of Silitek Corporation, a Taiwan company.

3. This case concerns whether respondent had title to computer keyboards that were manufactured in Taiwan and sold F.O.B. Taiwan to petitioner's customer, Reveal Computer Products, Inc. Under a long-term rate

and service agreement with Reveal, petitioner collected the goods from the seller, Silitek Corporation, in Taiwan and transported them to Los Angeles. Based on information provided by Silitek, petitioner prepared a negotiable bill of lading that consigned the goods to the order of Reveal. After the goods arrived in California, Reveal asked petitioner to deliver half of the shipment. Petitioner delivered half of the goods to Reveal without requiring Reveal to surrender the negotiable bill of lading. As frequently happens, Reveal had not yet received the bill of lading from Silitek, to whom petitioner had given it upon picking up the goods in Taiwan. By delivering the goods without surrender of the original bill, petitioner ran the risk that Reveal might have negotiated (or would later negotiate) the bill to a third party, which would then, as a good-faith purchaser, be entitled to the goods. Reveal never negotiated the bill.

Respondent later emerged with the original bill of lading, and demanded that petitioner pay it for the value of the goods delivered to Reveal. Petitioner declined respondent's claim because Reveal, the order party, had not indorsed the bill; thus, under California's Uniform Commercial Code, respondent was not a "holder" of the bill, CAL. U. COM. CODE § 1201(20), and was not entitled under the document. *Id.* § 7403(4).

4. Claiming entitlement to and damages for the goods delivered to Reveal, respondent brought this action by filing a complaint in the district court, invoking the court's commerce-clause jurisdiction under 28 U.S.C. § 1337. Respondent claimed it had acquired title to the goods by means of an assignment of rights from the seller, Silitek. Respondent produced a letter in which Silitek assigned its rights against Reveal, and claimed

that this assigned the right to the goods under petitioner's bill of lading.

Respondent moved the district court for a summary judgment, claiming it was entitled to recover damages from petitioner under the Ninth Circuit's decision in *C-Art Ltd. v. Hong Kong Islands Line America*, 940 F.2d 530 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992).

Adopting respondents' proposed findings of fact and conclusions of law (Pet. App. 16-21), which made no reference to the California law governing documents of title, the district court found that, "[p]ursuant to the terms of said bill, the goods were 'consigned to order of' Reveal. . . . " Pet. App. at 17 ¶ 6. Despite the "order" language, the court did not address the fact that petitioner's bill of lading was a negotiable document of title, and did not discuss the legal significance of the fact that the document was made to the order of Reveal. Although the California Uniform Commercial Code expressly governs title under documents of title such as petitioner's bill of lading, the district court ignored the California statute and held that respondent was entitled to the goods under its letter of assignment from Silitek.

5. On petitioner's appeal, the Ninth Circuit affirmed the judgment for respondent. Although Judge William Fletcher, during oral argument, distinguished the bill of lading in *C-Art* as having been made to the order of the shipper, not – as here – to the order of the buyer, the Ninth Circuit cited *C-Art* and this Court's decision in *Pere Marquette Ry. v. J.F. French & Co.*, 254 U.S. 538, 546-47 (1921), for the rule that failure to require surrender of the indorsed bill of lading before delivery of the goods when the bill of lading so requires is actionable misconduct on

the carrier's part. *See Lite-On Peripherals, Inc. v. Burlington Air Express, Inc.*, 255 F.3d 1189, 1192 (9th Cir. 2001); Pet. App. at 5. Rejecting petitioner's assertion that the question of who is entitled to the goods under a negotiable bill of lading is controlled by California's Uniform Commercial Code, the Ninth Circuit proceeded to fashion a federal rule of decision, which it premised on *C-Art* and *Pere Marquette*. *See Lite-On*, 255 F.3d at 1192; Pet. App. at 5. Viewing these cases as an expression of controlling law, the Ninth Circuit declined to discuss the applicability of the California Uniform Commercial Code, and offered no reason why that state statute should be deemed preempted by the law expressed in these federal cases.

Drawing on *Pere Marquette* and *C-Art*, the Ninth Circuit held that respondent had a cause of action based on petitioner's "misdelivery" to Reveal. The court of appeals found a basis for this actionable claim in its conclusion that Silitek, the Taiwanese seller, was a party to petitioner's bill of lading, and could thus hold petitioner liable for delivering to Reveal. The court cited form language on the back of the bill which defined the term "Merchant," used throughout the bill, as including the "consignor," among others. The court held that Silitek, as the consignor, must be deemed a party to the bill, citing for support its holding in *All Pacific Trading, Inc. v. Vessel M/V HANJIN YOSU*, 7 F.3d 1427, 1431-32 (9th Cir. 1993), *cert. denied sub nom. Hanjin Container Lines, Inc. v. Tokio Fire & Marine Ins. Co.*, 510 U.S. 1194 (1994). *See Lite-On*, 255 F.3d at 1193-94; Pet. App. at 8-9. The Ninth Circuit theorized that Silitek was a party to the bill of lading, even though *Reveal* had contracted with petitioner to transport the goods from Taiwan – *cf. Thunderbird Motor Freight Lines, Inc. v. Seaman Timber Co.*, 734 F.2d 630, 632

(11th Cir. 1984) (consignee, not consignor, was shipper). Based on its theory that Silitek was the contracting party, the Ninth Circuit held that repondent, as Silitek's assignee, was entitled to demand the goods, and to recover damages from petitioner for delivering them to Reveal. *See Lite-On*, 255 F.3d at 1193-94; Pet. App. at 7-10.

The court of appeals adopted respondent's argument that it had not been Silitek's intention to have the goods delivered to Reveal prior to receiving Reveal's payment for the goods:

> The idea that Silitek would send Reveal goods for which it had not been paid, with no guarantee that it would receive payment, simply does not hold water. Until Silitek obtained payment, its interests depended on Burlington's performance of its promise to deliver the goods only upon surrender of the bill of lading. Thus, we reject Burlington's claim that Silitek was a stranger to the shipping contract.

Id. at 1194; Pet. App. at 10.

The Ninth Circuit did not account for the fact that Silitek, the seller, had instructed petitioner to consign the goods to the order of Reveal. In fact, the court of appeals concluded that the bill's "order" language was irrelevant: "[I]t does not matter that Lite-On was not a holder in due course of a bill of lading that had been endorsed by Reveal. . . . " *Id.* at 1195; Pet. App. at 11.

6. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc. The petition pointed out that the panel's decision had fashioned federal common law to determine whether respondent had an actionable claim under a document of title that was

subject to state law. Urging reconsideration, the petition cited this Court's admonition, in *Erie R. Co. v. Tompkins*, 364 U.S. 68 (1938), that the federal courts may not create federal common law to override state law unless the state law has been preempted by Congress. *Id.* at 78-80.

The panel acted on the petition for rehearing by ordering respondent to submit a response. The panel's order admonished counsel for both parties to be mindful of "the importance of this matter to the transportation industry. . . . " *See* Pet. App. at 22-23.

After respondent filed its response to the petition, the Ninth Circuit issued an order denying the petition for rehearing and the suggestion for rehearing en banc. *See* Pet. App. at 24-25.

7. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This petition should be granted for two reasons. *First*, the Ninth Circuit's judgment, as a practical matter, creates a federal rule of decision for determining title to property covered by a negotiable document of title. Heretofore, such determinations have been exclusively within the province of each state's law; all fifty states have enacted uniform rules for rights to property under documents of title, and Congress has not seen fit to occupy the field, under the dormant commerce clause or any other constitutional pretext. Whether Congress has declined to act because it has viewed title to property as not a federal concern, or because the enactment of a uniform law for documents of title by all fifty states has satisfied the need

for a national law on the subject, the field has never been preempted, and issues of title are governed solely by state law. By creating a federal rule for determining entitlement to goods under a negotiable bill of lading, the Ninth Circuit below ignored the basic principles of federalism and comity, and rendered a decision that conflicts with this Court's holding in *Erie* – which prohibits federal courts from creating federal common law to resolve commercial disputes. The question of entitlement under a document of title is answered specifically by Article 7 of the Uniform Commercial Code, which has been adopted with little, if any, variation by all fifty states. Under this Court's holding in *Erie*, the Ninth Circuit was not authorized to supplant this uniform state commercial law with a contrary federal common-law rule.

Second, if the Ninth Circuit's holding that federal common law governs this action was in error, there would appear to be no basis for subject-matter jurisdiction, and the judgment should be vacated.

I. The Decision Below Creates a Federal Rule That Displaces the Controlling State Statute.

A. There is no federal statute that governs title to goods.

Title to goods, as in cases of title to any private property, is a subject of state, and not of federal, law. In this case, title to goods covered by a negotiable bill of lading is governed by the California Uniform Commercial Code.

Although petitioner's bill of lading was subject to the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.

app. §§ 1300-1315 ("COGSA"), the act applied, by its own terms, only from the time the goods were loaded on until the time they were discharged from the ship. *See id.* § 1301(e). The goods were discharged from the ship on February 2, 1996, and were delivered to Reveal on February 6, 1996, four days after COGSA ceased to apply.

No other federal statute applied to the goods or the bill of lading. The Federal Bills of Lading Act (or Pomerene Act), 49 U.S.C. §§ 80101-80116, does not apply (as COGSA does) to bills of lading issued in a foreign country for the delivery of goods to the United States. *See id.* § 80102. As petitioner's bill was issued in Taiwan, the Pomerene Act does not apply.

The district court cited the Carmack Amendment, 49 U.S.C. § 14706 (*see* Pet. App. at 17 ¶ 1). But the Carmack Amendment does not apply to any surface transportation in the United States under a bill of lading that includes ocean transportation from a foreign country. *See id.* § 13501. As petitioner's bill covered ocean transportation from Taiwan to Los Angeles, the Carmack Amendment does not apply.

Under the Shipping Act, the Federal Maritime Commission regulates ocean transportation intermediaries such as petitioner, but the Commission does not regulate in any area implicated by respondent's complaint below. The Commission has no jurisdiction to adjudicate the rights of various claimants to property such as the goods in this case. *See* Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1722 *passim*.

In sum, no federal statute regulates title to the computer keyboards covered by petitioner's bill of lading.

B. In every state, title to goods is governed by the state's enactment of the Uniform Commercial Code.

The state-law rules for determining who has title to goods under a negotiable bill of lading such as petitioner's are straightforward and uniform. All fifty states have enacted Article 7 of the Uniform Commercial Code. Article 7 covers documents of title. The rubric "documents of title" includes bills of lading. *See* CAL. COM. CODE § 1201(6); U.C.C. § 1-201(6). A bill of lading may be negotiable or nonnegotiable. If negotiable, it reflects the carrier's agreement to deliver the goods described in the bill to the "order" of some person. The bill may identify the person whose order will be honored, or may simply state "to order," which makes it bearer paper. *See* CAL. U. COM. CODE § 7104(1)(a); U.C.C. § 7-104(1)(a).

Only the "holder" of a negotiable bill of lading may claim title to the goods covered by the document. Article 1 defines the holder as "the person in possession if the goods are deliverable to bearer or to the order of the person in possession." CAL. U. COM. CODE § 1201(20); U.C.C. § 1-201(20).

The code provides that "[a] negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone." CAL. U. COM. CODE § 7501(1); U.C.C. § 7-501(1). The law requires a bailee or carrier such as petitioner to deliver the goods only to "a person entitled under the document. . . . " CAL. U. COM. CODE § 7403(1); U.C.C. § 7-403(1).

In this case, respondent was the person in possession of the negotiable bill of lading, because Silitek, instead of sending the bill to Reveal, gave it to respondent. The Ninth Circuit affirmed the judgment for respondent based on what it perceived to be respondent's contractual rights under the bill. Had the Ninth Circuit applied sections 7403 and 7501 of California's Uniform Commercial Code, it would have been compelled to conclude that respondent was not entitled to the goods because, although respondent possessed the bill, the document ran to Reveal, not to respondent. Under California law – as under the law of all fifty states – respondent could not demand the goods or recover damages from petitioner because it was not the "**holder**" of petitioner's bill of lading,[1] and was not "a person entitled under the document. . . . " CAL. U. COM. CODE § 7403(1); U.C.C. § 7-403(1). The bill was made to the order of Reveal, and respondent had possession *without indorsement* by Reveal.

Federal courts have been called upon, in numerous diversity cases, to apply the relevant provisions of the forum state's enactment of the Uniform Commercial Code. But the Ninth Circuit declined to apply California's enactment of the U.C.C.'s document-of-title provisions in this nondiversity case. Without explaining why it believed California's commercial statute did not apply,

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[1] Only the "holder" of a negotiable bill may enforce the bill as a contract. *See, e.g.*, the Second Circuit's explanation that "the holders of a 'bill of lading, are in contractual relation with the carrier and entitled to enforce the contract.' " *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878, 879 (2d Cir.), *cert. denied*, 283 U.S. 856 (1931) (quoting *Higgins v. Anglo-Algerian S.S. Co.*, 248 F. 386, 387 (2d Cir. 1918)).

the Ninth Circuit fashioned a federal rule of decision, and held that respondent had an actionable claim against petitioner under the bill of lading even though it was not a holder because the bill had not been indorsed by Reveal. *See Lite-On, supra,* 255 F.3d at 1195; Pet. App. at 11.

By adopting Article 7 of the Uniform Commercial Code and the definitions in Article 1, the states have adopted uniform rules for determining who is "entitled" under a document of title. Under California's Uniform Commercial Code, as petitioner argued, respondent was not entitled under the document because the document – petitioner's bill of lading – was made to the order of Reveal, not to the order of respondent, and because Reveal had not indorsed the document. *See* CAL. U. COM. CODE § 7501(1); U.C.C. § 7-501(1). Under the California statute and its analogue in each of the other states, title to the goods described in a negotiable bill of lading can be transferred to another person only if the party to whose order the bill is made indorses the document. Just as B cannot make presentment and demand payment of a negotiable instrument such as a check made to the order of A unless A has indorsed the instrument, so respondent could not demand delivery of goods under a document of title made to the order of Reveal unless Reveal had indorsed the document.

C. The Ninth Circuit displaced the California Uniform Commercial Code with a federal rule of decision.

Although petitioner's briefing explained the application of the California Uniform Commercial Code, the Ninth Circuit refused to apply it. The Ninth Circuit also declined to explain why it would not apply California law. Without comment it rejected the applicable state law and created a federal rule of decision, which is based on this Court's decision in *Pere Marquette, supra,* 254 U.S. 538, the Ninth Circuit's decisions in *C-Art, supra,* 940 F.2d 530, and *All Pacific, supra,* 7 F.3d 1427, and the Second Circuit's opinion in *Allied Chemical Int'l Corp. v. Companhia de Navegacao Lloyd Brasiliero,* 775 F.2d 476 (2d Cir. 1985), *cert. denied,* 475 U.S. 1099 (1986). Notably, the Ninth Circuit offered no reason for creating a federal rule of decision to supplant the California statute governing documents of title.

The Ninth Circuit overlooked the fact that *Pere Marquette* dealt with an interstate bill of lading, which was governed by the provisions of the Pomerene Act, and which was issued by a rail carrier subject to the Interstate Commerce Act. That case, plainly, was within the commerce-clause jurisdiction of the Court. *See* 28 U.S.C. § 1337. As discussed above, the only statute applicable to delivery and title to the goods under petitioner's bill of lading is California's enactment of Article 7 of the Uniform Commercial Code.

This is not, as the Ninth Circuit perceived it, a case of delivering goods to someone other than the rightful

owner. This is a case, instead, of the Ninth Circuit refusing to acknowledge that Reveal had title to the goods and was the rightful owner under the applicable state law.

Reluctant to believe that Silitek would do what it did – deliver the goods to Reveal on credit terms – the Ninth Circuit did not follow its analysis of the F.O.B. Taiwan delivery term to its logical conclusion. If, as the court conceded, title to the goods transferred to Reveal when Silitek delivered them to petitioner, *see Lite-On*, *supra*, 255 F.3d at 1193; Pet. App. at 7, then petitioner was the bailee of *Reveal's* goods, not of Silitek's goods. Therefore, delivering the goods to *respondent* would have been a misdelivery, for respondent, as Silitek's assignee, had no more right to demand Reveal's goods than Silitek did. Had petitioner delivered to respondent, as the Ninth Circuit held it should have done, it would have been liable to Reveal for misdelivering Reveal's goods to a person who was not entitled to them under the document of title.

Under the federal rule of decision it fashioned, the Ninth Circuit thus reached the opposite result of the one required by the applicable state law – creating the possibility of thousands of future actions against carriers by persons who, though not entitled under the document of title, may hope to thwart the operation of state law by relying on the contrary federal rule announced in *Lite-On*.

D. The national uniformity achieved by the Uniform Commercial Code is vital to American commerce.

The Ninth Circuit's decision contradicts the basic provisions of the Uniform Commercial Code which govern rights under negotiable documents of title in all fifty states, making the decision one of exceptional importance.

The importance of negotiable documents cannot be overstated. According to Professor Edward Rubin of the University of Pennsylvania School of Law:

> Negotiability is one of the great legal concepts of the Western world, one that has been with us longer than democracy or human rights. It freed us from our atavistic dependence upon jewelry metal as our basic form of money, carried commerce across physical distances and political divides, and transformed banks from warehouses of valuables into financial intermediaries.

Edward L. Rubin, *Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice*, 31 IDAHO L. REV. 775 (1995).

Commenting on the importance of negotiable bills of lading as documents of title, the Second Circuit observed:

> [A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. It constitutes acknowledgment by a carrier that it has

> received the described goods for shipment. It is also a contract of carriage. As a document of title it controls the possession of the goods themselves. . . . It has been said that the bill and the goods become one and the same, with the goods being 'locked up in the bill.'

Berisford Metals Corp. v. S/S SALVADOR, 779 F.2d 841, 845 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986) (citing *Allied Chemical, supra,* and quoting GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 96 (2d ed. 1975)).

As the American economy became increasingly nationalized after the Civil War, the American Bar Association came to recognize the need for uniformity in the laws governing interstate commercial transactions. This growing awareness prompted the organization, in 1892, of the National Conference of Commissioners on Uniform State Laws, which drafted the Uniform Commercial Code and achieved its adoption by all the states. *See* remarks by Professor Fred H. Miller in Albert J. Rosenthal, moderator, *A Symposium on Film and the Law: Discussion: Uniform State Laws: A Discussion Focused on the Revision of the Uniform Commercial Code*, 22 OKLA. CITY U.L. REV. 257, 273 (1997).

Dean Emeritus Rosenthal of Columbia University School of Law offered this explanation of the importance of uniformity in commercial laws:

> Differences in law from state to state impose a particularly heavy toll on the efficiency of many kinds of commercial transactions, and with the steady expansion of markets over larger and larger areas the value of uniformity continues to

> grow. Since this value is especially great in the field of commercial law, it is not surprising that the greatest efforts and accomplishments of the uniform law process have been in that field. This has been true from the very beginning, starting with the Uniform Negotiable Instruments Law and the Uniform Sales Act, and it is truer than ever today with the tremendous importance of the Uniform Commercial Code, which is probably the most significant statutory construct in American legal history.

Introductory remarks by Dean Albert J. Rosenthal, *id.* at 258-59.

The Ninth Circuit's decision overlooks the applicable provisions of California's Uniform Commercial Code, and thereby creates a federal common-law rule that conflicts with the uniform rules adopted by all fifty states for determining who is entitled to goods under a negotiable bill of lading. By giving birth to a rule that negates the Uniform Commercial Code, the opinion promises to impair the effectiveness of negotiable documents of title and to cast doubt on the predictability of commercial transfers in one of "those fields where uniformity among the states is felt to be crucial for the operation of the national economy and no deviation can be tolerated. . . ." Remarks of Joanne Barker (Counsel to New York State Assembly Judiciary Committee), *id.* at 283-84.

Though the potential impact of the Ninth Circuit's decision cannot be precisely measured, statistics on containerized imported goods entering the United States through the nation's largest ports will give some sense of the pervasive effects this decision may have. In the year

2000, the Port of Long Beach handled 4,600,787 TEUs[2] holding goods valued at $98.2 billion.[3] If each of those container units carried goods covered by just one negotiable bill of lading, that would involve the transfer of title under some 4.6 million documents of title in this one port in a single year. The numbers for the adjacent Port of Los Angeles are smaller, but still impressive: In the ten months of January through October, 2001, Los Angeles received 2,232,868.20 TEUs.[4] This would project to about 2.7 million TEUs for the entire year, or another 2.7 million documents of title if we assume just one bill of lading per container unit. The Port Authority of New York and New Jersey reported handling more than one million containers in the first six months of 2000.[5]

Thus, in a given year, the ports of Long Beach, Los Angeles, and New York and New Jersey could, conservatively, receive goods covered by more than nine million documents of title like the bill of lading issued by petitioner here. By setting up a federal rule of decision that

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[2] A "TEU" is a "Twenty-foot-Equivalent Unit," the standard used in the transportation industry to measure the number of containers moving on a ship or through a port. *See, e.g., United States v. Federal Maritime Comm'n*, 210 U.S. App. D.C. 134, 655 F.2d 247, 249 n.6 (1980).

[3] *See* Port of Long Beach Annual Shipping Volume Page (visited Nov. 21, 2001) <http://www.polb.com/cv.htm>.

[4] *See* Port of Los Angeles 2001 Statistics (visited Nov. 21, 2001) <http://www.portoflosangeles.org/detailstatistic.asp?fiscal_year=2001>.

[5] *See Cargo Continues Strong Gains in Port of NY/NJ*, Oct. 17, 2000 (visited Nov. 21, 2001) <http://www.panynj.gov/pr/139-00.html>.

contradicts the state rules adopted in California, New York, New Jersey, and the other forty-seven states, the Ninth Circuit's decision creates the potential for a staggering number of title disputes.

Given the vital importance of national uniformity of *negotiable documents of title* – which patently is a state, and not a federal, concern – this petition for a writ certiorari should be granted to permit review of the Ninth Circuit's far-reaching decision.

E. The decision below conflicts with this Court's holding in *Erie*.

From a constitutional perspective, the Ninth Circuit's decision essentially returns to the rule this Court announced in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which held that the federal courts may declare uniform federal rules of decision for issues of general commercial law. In the vein of *Swift v. Tyson*, the Ninth Circuit has declared that the assignee of a seller under a negotiable bill of lading is entitled to the goods under federal case law, even though the assignee is not "entitled under the document" because it is not the person to whose order the negotiable bill was made and does not hold the bill by indorsement by the order party. This Court overruled *Swift v. Tyson* in 1938, declaring its doctrine of federal general commercial law unconstitutional. *See Erie, supra*, 304 U.S. at 78-80. The Ninth Circuit's decision contradicts *Erie* and returns to the unconstitutional rule of *Swift v. Tyson*.

In reaching its decision, the Ninth Circuit declined to apply state law, as reflected in the California Uniform

Commercial Code, and displaced uniform state law by announcing a contrary federal rule for determining title. Under uniform state law, respondent is *not* "entitled under the document," CAL. COM. CODE § 7403(1); U.C.C. § 7-403(1), i.e. under petitioner's negotiable bill of lading, because the bill is made to the order of Reveal, not to respondent, and was not indorsed by Reveal. *See* CAL. COM. CODE § 7501(1); U.C.C. § 7-501(1).

Instead of applying these controlling rules of uniform state law, the Ninth Circuit asserted: "[I]t does not matter that Lite-On was not a holder in due course of a bill of lading that had been endorsed by Reveal, as Burlington argues it must have been in order to be able to sue on the bill." *Lite-On, supra,* 255 F.3d at 1195; Pet. App. at 11. Concluding that a main purpose of the bill's "surrender-upon-delivery clause was to *prevent* the bill of lading from getting into the hands of an insolvent buyer such as Reveal," *id.* at 1195; Pet. App. at 11 (original emphasis), the Ninth Circuit rejected the application of uniform state commercial law, and announced a federal rule which it fashioned, in part, from the Second Circuit's *Allied Chemical* decision.

Allied Chemical, supra, 775 F.2d 476, is inapposite because it concerned – as this case does not – a documentary sale, a letter-of-credit transaction. In that case, the Second Circuit held the carrier liable for delivering goods to the consignee without requiring surrender of the original bill of lading duly indorsed. The Ninth Circuit did not remark the pivotal difference between the sales transactions in *Allied Chemical* and this case. The sale of goods in *Allied Chemical* was a *documentary* sale – i.e. a letter-of-

credit sale, subject to Article 5 of the Uniform Commercial Code; a sale requiring payment *in exchange for delivery*. *See Allied Chemical*, 775 F.2d at 481-82. In this case, however, there was no documentary sale; Silitek did not cause the bill to be made to the order of a bank so as to ensure payment before release of the goods, as the seller did in *Allied Chemical*. Instead, Silitek instructed petitioner to make the bill to the order of Reveal, because – as Silitek's sales invoice reflects – the payment term was on account/ninety days.

Further, the bank, as the order party in *Allied Chemical*, did not indorse the Lloyd Brasiliero bill of lading. As a result, title never passed to the buyer. Thus, the carrier – consistent with uniform state law – was liable for delivering the goods to the buyer because the buyer was a person *not* entitled under the document. In this case, title passed to the buyer, Reveal, when petitioner received the goods from the seller, Silitek, in Taiwan, as shown by the "F.O.B. Taiwan" delivery term in Silitek's invoice. According to the Uniform Commercial Code and *Black's Law Dictionary*, as the Ninth Circuit conceded, the F.O.B. Taiwan term "would mean that title to the keyboards transferred to Reveal when Silitek delivered the keyboards to Burlington in Taiwan." *Lite-On*, 255 F.3d at 1193; Pet. App. at 6 (citing U.C.C. § 2-319(1); BLACK'S LAW DICTIONARY 578 (5th ed. 1979)).

The Ninth Circuit acknowledged that the "F.O.B. Taiwan" delivery term indicated that Silitek had transferred title to the goods on delivering them to petitioner in Taiwan, *see id.* at 1193; Pet. App. at 6, but the court refused to recognize the effect of that transfer of title under California Uniform Commercial Code § 2319(1).

Instead, the Ninth Circuit relied on its *C-Art* decision for the proposition that when the terms of a bill of lading conflict with the terms of the underlying sales contract, the bill of lading terms will govern. *See Lite-On*, 255 F.3d at 1194-95; Pet. App. at 10-11 (citing *C-Art, supra*, 940 F.2d at 553). Although petitioner's bill of lading – the document of title to the goods – was made to the order of Reveal, the Ninth Circuit did not explain why it felt there was a conflict between the bill and the F.O.B. Taiwan term, which, as the court acknowledged, effected transfer of title to Reveal. Declining to adhere to the California statute, the Ninth Circuit held that Silitek was still entitled to the goods under the rule of *C-Art*.

Under *Erie*, the Ninth Circuit's displacement of state law with a federal rule of decision for a commercial dispute is unconstitutional. Respondent founded this action on the federal commerce jurisdiction, 28 U.S.C. § 1337(a). But Congress has never regulated negotiable documents of title, and "[t]here is," as *Erie* explains, "no federal general common law." *Erie, supra*, 304 U.S. at 79.

As the Fifth Circuit has observed, "The federalism concern of *Erie* is applicable to every federal tribunal when federal substantive law has not expressly or impliedly displaced the state substantive law on the particular question for decision." *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 645 F.2d 360, 384 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). It was, thus, unconstitutional for the Ninth Circuit to fashion a federal rule to replace the provisions of California's Uniform Commercial Code.

The Ninth Circuit's decision below suffers from the same constitutional defect as its decision in *O'Melveny & Myers v. FDIC*, 969 F.2d 744 (9th Cir. 1992), *rev'd*, 512 U.S. 79 (1994). In *O'Melveny* the Ninth Circuit held that, although the FDIC was asserting causes of action created by California law, a federal common-law rule and not California law would apply to determine whether the knowledge of corporate officers acting against a corporation's interest would be imputed to the corporation. *See* 512 U.S. at 83. This Court unanimously reversed the Ninth Circuit's application, in *O'Melveny*, of a federal rule of decision, "as it is so plainly wrong. 'There is no federal general common law.' " *Id.* (quoting *Erie*, *supra*, 304 U.S. at 78). This Court decided that California state law must govern the imputation of corporate officers' knowledge when the FDIC asserts state-law causes of action in its capacity as a corporation's receiver. *See O'Melveny*, 512 U.S. at 83-85. As Justice Stevens explained in a concurring opinion:

> Federal courts, . . . "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). Because state law provides the basis for respondent FDIC's claim, that law also governs both the elements of the cause of action and its defenses. Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.

O'Melveny, 512 U.S. at 90 (Stevens, J., joined by Blackmun, O'Connor, & Souter, JJ., concurring).

As with the FDIC's claim in *O'Melveny*, state law provides the basis for respondent's claim here, and governs both the elements of the cause of action and its defenses. Respondent claimed title to goods covered by a document of title – petitioner's negotiable bill of lading. California's Uniform Commercial Code provides the basis for any claim of title to goods covered by a document of title, and governs the elements of proof necessary to establish such a claim and any defenses to it. By fashioning a federal rule of decision to supplant the California statute, the Ninth Circuit impermissibly created federal common law in violation of the principle this Court set forth in *Erie* and enforced by reversing the Ninth Circuit's decision in *O'Melveny*. Rejecting petitioner's appeal seeking to apply California law, the Ninth Circuit created a federal rule of decision, in contravention of *Erie*'s express injunction.

Except in the Ninth Circuit, the rule of *Erie* has not dimmed with time. In the 1998 Term, this Court applied it in *Alden v. Maine*: "As we explained in *Erie R. Co. v. Tompkins*, 304 U.S. 68 (1938):

> The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – *independence in their legislative and independence in their judicial departments*. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence. *Id.* at 78-79."

Alden v. Maine, 527 U.S. 706, 754 (1999) (quoting *Erie*, *supra*, 304 U.S. at 78-79) (emphasis added).

A recent dissenting opinion summarizes the law as follows:

> [E]ver since the watershed case of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court has rejected the notion that it can create a federal common law to fill in great silences left by Congress, and thereby pre-empt state law. We have recognized that "a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981).

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 615 (1997) (Thomas, J., joined by Scalia, J., & Rehnquist, C.J., dissenting).

In the 1996 Term, this Court explained the limited circumstances in which a federal court might permissibly create a federal rule of decision despite the existence of state law on the question:

> "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for " 'Congress acts . . . against the background of the total *corpus juris* of the states. . . . ' " *Id.*, at 68 (quoting H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953)). Thus, normally, when courts

> decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." 384 U.S. at 68. Indeed, such a "conflict" is normally a "precondition." *O'Melveny, supra,* at 87. See also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991).

Atherton v. FDIC, 519 U.S. 213, 218-19 (1997).

The Ninth Circuit's decision infringes this "guiding principle," by failing to show any conflict between uniform state law and some federal policy or interest which would warrant the appellate court's resort to a federal rule of decision. On grounds of federalism and comity, and because it directly conflicts with the rule of *Erie*, the Ninth Circuit's decision below should be reversed.

II. If Federal Law Does Not Govern the Question of Who Is Entitled Under a Document of Title, There Is No Subject-Matter Jurisdiction and the Judgment Should Be Vacated.

Respondent's complaint asserted that the district court had original jurisdiction of its claim under petitioner's bill of lading by virtue of the provisions of 28 U.S.C. § 1337.

The jurisdiction specified in section 1337 arises "under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . . " *Id.* § 1337(a). Neither the judgment of the district court nor the Ninth Circuit's affirming opinion cites to any act of Congress as the basis for the

judgment or as the source of the remedy. The district court merely notes that respondent alleged misdelivery under the Carmack Amendment. *See* Pet. App. at 17 ¶ 1. As noted above, at page 9, the Carmack Amendment does not apply. *See* 49 U.S.C. § 13501. The district court based its judgment, and the Ninth Circuit based its affirmance, on the Ninth Circuit's decision in *C-Art, supra,* 940 F.2d 530, on this Court's decision in *Pere Marquette, supra,* 254 U.S. 538, and on the Second Circuit's decision in *Allied Chemical, supra,* 775 F.2d 476.

The Ninth Circuit felt that these federal cases furnished the applicable rule of decision. It thus refused to apply the California statute governing documents of title, and provided no *ratio decidendi* for fashioning a federal rule of decision where the question of respondent's entitlement under the document was expressly the subject of California statutory law. The Ninth Circuit denied the petition for rehearing and denied the suggestion for rehearing en banc without explaining why it need not adhere to this Court's rule in *Erie, supra,* 364 U.S. at 79, or consider the Fifth Circuit's admonition that "[t]he federalism concern of *Erie* is applicable to every federal tribunal when federal substantive law has not expressly or impliedly displaced the state substantive law on the particular question for decision." *Pennzoil, supra,* 645 F.2d at 384.

Since it based its decision on federal cases, it is apparent that the Ninth Circuit believes that federal substantive law has expressly or impliedly displaced the state substantive law – not only in California but, logically, in every state jurisdiction – on the particular question of who is entitled to goods under a document of title.

But if the federal substantive law is not embodied in an act of Congress, on what basis may the Ninth Circuit conclude that federal law has displaced the states' enactments of Article 7 of the Uniform Commercial Code? "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

In *Atherton, supra*, this Court wrote that " '[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." 519 U.S. at 218 (quoting *Wallis, supra*, 384 U.S. at 68). The Ninth Circuit below cited no decision of Congress, no federal statute that even colorably preempts the uniform commercial law of the fifty states. Citing various decisions of its own and of other courts, the Ninth Circuit instead created a federal rule of decision to displace the governing California statute.

As discussed in section I above, this decision puts the Ninth Circuit at odds with this Court's concern for federalism and comity, and conflicts with the principles of *Erie*. But separate and apart from this unconstitutional displacement of state substantive law, the absence of a governing federal statute suggests that the Ninth Circuit lacked subject-matter jurisdiction under 28 U.S.C. § 1337. Absent a federal statute, the only arguable basis of jurisdiction under 28 U.S.C. § 1331 would be the "dormant"

commerce clause. As there is no act of Congress regulating entitlement to goods under documents of title, the judgment can stand only if subject-matter jurisdiction is founded on what this Court has termed the "dormant" or "negative" commerce clause. "There is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

Through the years, this Court has struck down a number of state statutes under the dormant commerce clause. But this Court has never held that any state's enactment of Article 7 of the Uniform Commercial Code is violative of the Constitution. As respondent's claim is subject to the provisions of California's enactment of Article 7, the commerce clause – triggering application of 28 U.S.C. § 1331 – would be a federal court's only possible source of jurisdiction to adjudicate respondent's claim.

Petitioner submits that the commerce clause does not apply; that the Constitution – and hence 28 U.S.C. § 1331 – does not confer jurisdiction over respondent's claim; and that the lower courts lacked subject-matter jurisdiction. In the absence of an act of Congress or a provision of the Constitution which delegates authority to the federal courts to decide entitlement to property under documents of title, the Ninth Circuit and the district court had no subject-matter jurisdiction. This Court should, therefore, vacate the judgment with instructions to dismiss the complaint for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LITE-ON PERIPHERALS, INC.,
a Corporation,

Plaintiff-Appellee,

v.

BURLINGTON AIRE EXPRESS, INC.,
a Corporation, dba Burlington
Ocean Services,

Defendant-Appellant,

and

DOES 1 THROUGH 10, inclusive,

Defendant.

No. 99-57003

D.C. No.
CV-98-07709-JSL

OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted, Pasadena, California
June 6, 2001 – Pasadena, California
Filed July 10, 2001

Before: Procter Hug, Jr., Stephen S. Trott, and
William A. Fletcher, Circuit Judges.

Opinion by Judge Trott

COUNSEL

Kathleen C. Jeffries, Russell, Hancock, Jeffries & Gaston LLP, Pasadena, California, for the appellee.

Michael W. Lodwick, Haight, Brown & Bonesteel, LLP, Santa Ana, California, for the appellant.

OPINION

TROTT, Circuit Judge:

In this case we must decide whether a consignor of goods named in a bill of lading has standing to sue the carrier for misdelivery of goods and breach of contract where there is evidence that the consignee, and not the consignor, entered into the shipment contract with the carrier. We answer this question affirmatively, and hold that, in this situation, the consignor of goods was a party to the contract evidenced by the bill of lading with full rights to enforce it. Accordingly, we affirm the district court's decision granting summary judgment in favor of the plaintiff.

FACTS

The parties in this case are Lite-On Peripherals, Inc. ("Lite-On") and Burlington Air Express, Inc. ("Burlington"). Lite-On sued Burlington for breach of contract and misdelivery of goods, alleging that Burlington had violated the terms of its own bill of lading by failing to obtain an endorsed copy of the bill before delivering goods to the buyer, Reveal Computer Products ("Reveal"). Because Reveal turned out to be insolvent, Burlington's failure to obtain a copy of the bill resulted in a loss of over $100,000 to Lite-On.

Lite-On's involvement with this case stems from its relationship with the Silitek Corporation, a Taiwanese

exporter of computer products. Lite-On is a subsidiary of Silitek, and is the assignee of Silitek's rights under the bill of lading that is the center of this dispute. The defendant, Burlington, is a company engaged in the business of transporting goods overseas. Reveal Computer Products is a computer manufacturing company located in California and is not a party to the case.

On January 22, 1996, Burlington received in Keelung, Taiwan, a shipment of 1,000 cartons of computer keyboards from Silitek. Silitek gave Burlington an invoice and a packing list that indicated that the keyboards were to be shipped to Reveal at its offices in California. Burlington, in turn, issued Silitek a document entitled a "Negotiable Combined Transport Bill of Lading." This bill of lading listed Silitek as the consignor of the keyboards. The goods were consigned to the order of Reveal, and listed "LPI" as a "notify party" along with Reveal. Although "LPI" was meant to refer to Lite-On, the bill of lading did not indicate this, nor did it list any address or contact information for LPI. The following language also appeared on the face of the bill: "One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods."

Although the bill of lading indicated that the keyboards were to be delivered to Reveal, Lite-On claims that Reveal was not in fact the intended consignee, but that Lite-On was. Lite-On claims that the goods were *ultimately* intended for Reveal, but that Lite-On was to receive them first and deliver them to Reveal only when Lite-On, on behalf of Silitek, was satisfied with Reveal's creditworthiness. Lite-On discovered the mistake when it received the bill of lading from Silitek. On January 29,

1996, as soon as the error was recognized, Lite-On claims that one of its employees telephoned Burlington and instructed it not to deliver the goods to Reveal. Lite-On also claims that on February 2, 1996, it sent Burlington a facsimile letter again instructing Burlington not to deliver the goods to Reveal. Burlington, however, claims to have no record of either the telephone call or the fax.

Burlington delivered the keyboards to Reveal. Reveal, however, did not give Burlington a copy of the bill of lading that was supposed to be obtained in exchange for the goods. In fact, Reveal has never had the bill, which has at all times been in either Silitek's or Lite-On's possession.

Lite-On was able to recover approximately half of the keyboards mistakenly delivered to Reveal. The unrecovered keyboards, however, were worth $101,602.80. Reveal has not paid Lite-On or Silitek for the keyboards it did receive, and has filed for bankruptcy. Silitek has now assigned to Lite-On all rights it possessed under the bill of lading.

After attempting unsuccessfully to obtain payment from Burlington for the misdelivered keyboards, Lite-On filed suit in federal district court. Lite-On alleged a claim for breach of contract, specifically, breach of the clause in Burlington's bill of lading that indicated that the keyboards would not be delivered without surrender of a duly endorsed bill. The complaint also included causes of action for misdelivery of cargo and negligence. After the parties had conducted informal discovery as ordered, the district judge entered summary judgment in favor of Lite-On. Burlington now appeals.

DISCUSSION

We review *de novo* a district court's decision to grant summary judgment. *See, e.g., Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). Making all inferences in favor of the non-moving party, we must determine whether material issues of fact exist that would necessitate a trial. *Id.* In this case, summary judgment in favor of Lite-On was appropriate.

Lite-On contends that this is a straightforward contract case. We agree. Lite-On is the assignee of Silitek's rights under the bill of lading, and is therefore able to enforce that contract as Silitek would. The bill of lading, which Burlington itself issued, contained a "surrender-upon-delivery" clause indicating that the keyboards would not be turned over to the named consignee, Reveal, unless the consignee produced an endorsed bill of lading. Despite this language, Burlington gave the goods to Reveal without first requiring Reveal to produce the bill. Burlington admits these essential facts, which are the only facts necessary to establish liability under the bill of lading. *See, e.g., Pere Marquette Ry. Co. v. J.F. French & Co.*, 254 U.S. 538, 546-47 (1921) (failure to require surrender of endorsed bill of lading before delivery of goods when bill of lading so requires is actionable misconduct on the part of the carrier); *C-Art Ltd. v. Hong Kong Islands Line America*, 940 F.2d 530, 532-33 (9th Cir. 1991) (same). Burlington, however, raises numerous issues as to why this case is not so simple. We address these arguments below.

A. Silitek Was a Party to the Bill of Lading Contract, and Lite-On, as Silitek's Assignee, Has Standing to Enforce it.

Burlington's arguments boil down to the central assertion that Silitek was a stranger to the shipping contract evidenced by the bill of lading, and that therefore, neither Silitek nor Lite-On has standing to enforce the surrender upon delivery clause. This argument fails, and once this card is pulled out, Burlington's whole house falls down.

Burlington bases its argument that Silitek was a stranger to the bill of lading on the following contentions and facts. First, it argues that Reveal, and not Silitek, arranged to have Burlington ship the keyboards from Taiwan to California. To support this contention, Burlington points to a pre-existing "Rate and Service Agreement" between it and Reveal, in which Reveal agreed to use Burlington for all its shipping needs.

Burlington also claims that Reveal paid the freight charges for the shipment of keyboards. It points out that the invoice provided by Silitek to Burlington contained the notation "F.O.B. Taiwan." Burlington argues that this notation means that Silitek was responsible for getting the keyboards to Burlington, but that Reveal would actually be responsible for Burlington's freight charges for the transportation to the United States. Burlington claims, not without some support, that the term "F. O.B. Taiwan" would mean that title to the keyboards transferred to Reveal when Silitek delivered the keyboards to Burlington in Taiwan. *See, e. g.*, U.C.C. § 2-319(1); Black's Law Dictionary 578 (5th ed. 1979). Burlington argues that

these facts and propositions demonstrate that Silitek was a stranger to the shipping contract, and that therefore Lite-On is an interloper in no position to bring this lawsuit.

Burlington's analysis misses the point. We assume for the sake of argument that Reveal made the arrangements to have Burlington ship the keyboards, that Reveal was responsible for the freight charges, and that the "F.O.B. Taiwan" notation would mean that title to the goods had theoretically passed to Reveal. Even if all these claims were true, none of them would mean that Silitek was a stranger to the shipping contract.

First, Burlington's claim that Silitek had nothing to do with the shipping contract is factually insupportable. The undisputed facts of this case demonstrate that Silitek *was* involved with the transaction that produced the bill of lading, despite Burlington's contentions to the contrary. As Burlington admits, Silitek was the party that gave it the invoices indicating what goods were to be shipped and to whom. Burlington incorporated the information on these invoices into the bill of lading. And Burlington *gave Silitek the bill of lading* when Silitek delivered the keyboards to Burlington in Taiwan. In contrast, Burlington never gave a copy of the bill to Reveal.

Silitek is also listed as the "consignor" of the goods on the face of the bill of lading. The fine print on the reverse of the bill indicates that a consignor is a party to the shipping contract evidenced by the bill. It indicates that the bill of lading is a contract between the "Carrier" and the "Merchant," and spells out various rights and

duties of those parties. The bill of lading defines "Merchant" as including several parties, namely, "the Shipper, *the Consignor*, the Consignee, the Holder of the Bill of Lading, the Receiver and the *Owner of the Goods*." (emphases added). The bill also lists certain duties specific to the Consignor; for example, it must indemnify the Carrier for all losses resulting from its own inaccurate description of goods. Thus, Burlington's own bill of lading expressly contemplates that the consignor is a party to the shipping contract. This fact forecloses any argument by Burlington that Silitek and Lite-On have no standing to enforce the provisions of the bill.

We have held in a similar case that where a seller of goods is included within the definition of "Merchant" under a bill of lading, a vessel owner cannot claim that the seller is not entitled to enforce the bill. *See All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1431-32 (9th Cir. 1993). In *All Pacific*, we observed that "because the [faces of the] bills of lading do not name any particular parties as Merchants, we must rely on the contract definition of Merchant on the reverse of the bills of lading." *Id.* at 1432. We noted that the definition of "Merchant" on the reverse of the bill of lading:

> unambiguously provides that the cargo owner has obligations under the bills of lading. The provision anticipates that the various parties defined as Merchants would be jointly and severally liable for freight charges. By defining Merchant broadly, the bills of lading attempt to create a broad range of parties from whom the carrier can seek payment for the shipment.

Id. The reasoning from *All Pacific* is applicable to this case. Burlington cannot seek to include a broad range of parties within the contract's definition of "Merchant," and then claim that one of those parties has no standing to enforce the surrender-upon-delivery clause.

Moreover, numerous cases have noted that a bill of lading is the basic shipping contract between a seller and carrier of goods. *See, e.g., Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982) (stating that "[t]he bill of lading is the basic transportation contract between the shipper-consignor and the carrier.") *citing Texas & Pacific Ry. Co. v. Leatherwood*, 250 U.S. 478, 481 (1919); *C-Art*, 940 F.2d at 532. Burlington correctly points out that these cases do not hold that a consignor is a party to the shipping contract *as a matter of law*, even where the arrangements for shipment may have been made by the buyer or consignee. However, as discussed above, the proposition that Silitek was a stranger to the shipping contract cannot be supported. Bills of lading, after all, are designed to prevent sellers of goods from losing money when distant or unfamiliar buyers turn out to be insolvent. In *Allied Chem. Int'l. Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), the Second Circuit noted that:

> The documentary sale [evidenced by a bill of lading] *enables the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of the goods until he has paid for them* . . . Absent a valid agreement to the contrary the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading . . . . If

> the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery.

Allied Chemical, 775 F.2d at 481 (emphasis added).

This case illustrates why surrender-upon-delivery clauses are necessary to protect a consignor's interest in shipped goods. Silitek had not been paid when it delivered the keyboards to Burlington, and it was not yet sure that Reveal, its ultimate customer, was creditworthy. The idea that Silitek would send Reveal goods for which it had not been paid, with no guarantee that it would receive payment, simply does not hold water. Until Silitek obtained payment, its interests depended on Burlington's performance of its promise to deliver the goods only upon surrender of the bill of lading. Thus, we reject Burlington's claim that Silitek was a stranger to the shipping contract.

B. Burlington's Argument That an "F.O.B. Place of Origin" Provision Can Alter a Carrier's Liability Fails.

Burlington's argument that Silitek was not a party to the contract is closely tied to its argument that the "F.O.B. Taiwan" provision in the bill of lading absolves it of liability. In *C-Art*, we rejected an argument nearly identical to Burlington's. In that case, the defendant-carrier argued that the fact that goods were shipped F.O.B. Hong Kong, the place of origin, indicated that the insolvent consignee had taken title to the goods, and that therefore the consignor could not claim that the goods had been misdelivered. *See C-Art*, 940 F.2d at 553. The bill of lading at issue in *C-Art* also had a "surrender upon delivery"

clause like the one in this case. We held that the defendant's arguments were:

> inimical to the express provisions of the bill of lading, as well as contradictory applicable authorities [which hold that possession of the original bill of lading conveys title and entitles the holder to the goods]. . . . Although the goods were shipped "F.O.B. Hong Kong," with [the consignee] bearing the risk of loss . . . it is undisputed that [the consignee] never paid C-ART for the goods. In this case, therefore, the bill of lading controls.

Id. Burlington's argument that the "F.O.B. Taiwan" provision in the bill of lading cuts off Silitek's rights under that contract therefore fails.

C. Burlington's Remaining Arguments Fail.

Once it is established that Lite-On, through Silitek, was a party to the shipping contract with standing to enforce the provisions of the bill of lading, Burlington's remaining arguments are easily dispatched.

First, it does not matter that Lite-On was not a holder in due course of a bill of lading that had been endorsed by Reveal, as Burlington argues it must have been in order to be able to sue on the bill. As discussed above, one of the purposes of the surrender-upon-delivery clause was to *prevent* the bill of lading from getting into the hands of an insolvent buyer such as Reveal. Therefore, it makes little sense to argue that a consignor cannot sue a carrier for misdelivery because the consignee – who should never have received the goods or the bill in the first place – has not endorsed the bill.

Burlington also argues that the district court ignored certain factual issues in granting Lite-On summary judgment. Specifically, it argues that a factual issue exists as to whether Burlington received Lite-On's phone call and faxed warning that Reveal was not to receive the shipment of keyboards. Burlington also argues that there are issues of fact remaining as to whether it or Silitek was at fault for the mistaken designation of Reveal as the consignee. While Burlington is correct that these issues represent genuine factual disputes, they are not material ones. Lite-On's breach of contract action would remain intact even if it had never attempted to warn Burlington not to deliver the keyboards to Reveal. Burlington's contractual liability would also remain intact whether or not the mistake in designating Reveal as the consignee was attributable to Silitek. If Burlington had abided by its own surrender-upon-delivery clause, the mistake would not have resulted in a loss of over $100,000 to Lite-On. The bill of lading specifically said that Burlington would not deliver the goods to *any* consignee – be it Reveal or Lite-On – without obtaining an endorsed bill of lading, and it breached this provision.

Burlington's remaining arguments are similarly misplaced. It is irrelevant whether Burlington would have been required to honor an order to stop delivery from Lite-On. The bill of lading specifically stated that the goods could not be delivered unless the buyer produced an endorsed bill, and Burlington disregarded this provision. Finally, whether Lite-On would have had an option to reclaim the goods from Reveal under section 2-702 (2) of the Uniform Commercial Code is likewise irrelevant. That a remedy against Reveal may have existed under the

U.C.C. or California's equivalent has no bearing on the issue of whether Burlington was liable for a breach of its own contract.

For the foregoing reasons, summary judgment in favor of Lite-On was appropriate. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

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FILED
NOV 30 1999

ENTERED
DEC – 1 1999

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LITE-ON PERIPHERALS, INC., a corporation, Plaintiff, v. BURLINGTON AIR EXPRESS, INC., a corporation doing business as BURLINGTON OCEAN SERVICES; and DOES 1 through 20, inclusive, Defendants.	Case No. CV-98-7709 JSL(CTx) [~~PROPOSED~~] JUDGMENT Pretrial Conference Date: November ~~24~~ 29, 1999 Time; ~~9:00 a.m.~~ 1:00 PM Place: Courtroom 4 Trial Date: December 14, 1999

The motion of plaintiff Lite-On Peripherals, Inc. ("Lite-On") for summary judgment in its favor and against defendant BAX Global, Inc., formerly known as Burlington Air Express, Inc., came on for hearing before the Court on November ~~24~~ 29, 1999 at ~~9:00 a.m.~~ 1:00 pm, the Honorable J. Spencer Letts presiding. Lite-On appeared through its attorneys, Russell, Hancock, Jeffries & Gaston LLP by Kathleen C. Jeffries. Burlington

appeared through its attorneys, Porter, Groff & Lodwick by _____.

The Court has considered all evidence presented by the parties on said motion and made its statement of uncontroverted facts and conclusions of law.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that plaintiff Lite-On Peripherals, Inc. shall recover from defendant BAX Global, Inc., formerly known as Burlington Air Express, Inc., the sum of $101,602.80 plus interest thereon from February 6, 1996 in ~~the sum of $_____~~ as provided by law and costs of suit ~~in the sum of~~ [SL] $_____.

Dated: 11/30, 1999

/s/ Sp Letts
The Honorable J. Spencer Letts
United States District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LITE-ON PERIPHERALS, INC., a corporation, Plaintiff, v. BURLINGTON AIR EXPRESS, INC., a corporation doing business as BURLINGTON OCEAN SERVICES; and DOES 1 though 20, inclusive, Defendants.	Case No. CV-98-7709 JSL(CTx) PLAINTIFF LITE-ON PERIPHERALS, INC.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (Local Rule 13.5) Trial Date: December 14, 1999 Time: 9:00 a.m. Place: Courtroom 4

Plaintiff Lite-On Peripherals, Inc. ("Lite-On") hereby submits its proposed findings of fact and conclusons of law as required by Local Rule 13.5:

ENTERED
DEC 1 1999

FINDINGS OF FACT

1. By its complaint, Lite-On has alleged four causes of action against Burlington, to wit, misdelivery under the Carmack Amendment to the Interstate Commerce Act, negligence, breach of written contract and conversion.

2. At all material times, Lite-On has been and now is a California-based corporation engaged in the computer hardware business.

3. At all such times, Lite-On's parent company has been and now is Silitek Corporation ("Silitek"), a Taiwan-based corporation.

4. On or about January 22, 1996 BAX Global, Inc., formerly known as Burlington Air Express, Inc., ("defendant" or "Burlington") received 1,000 cartons comprised of 5,000 computer keyboards from Silitek in Keelung, Taiwan for transportation to Los Angeles, California.

5. In connection with its receipt of said goods, Burlington issued a bill of lading in the form of its own negotiable combined transport bill of lading.

6. Pursuant to the terms of said bill, the goods were "consigned to order of" Reveal Computer Products, Inc. ("Reveal") in Chatsworth, California and were to be delivered to Reveal only upon surrender of a duly endorsed copy of said bill.

7. Specifically, the surrender language on the face of Burlington's bill read:

> "One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods."

8. Despite the presence of such provision on the face of its bill, Burlington delivered the computer keyboards to Reveal without obtaining a copy of the bill, endorsed or otherwise.

9. In fact, the bill was in the hands of Lite-On, Silitek's assignee for purposes of this case, at the time the goods were delivered to Reveal; and remains in Lite-On's possession today.

10. Furthermore, Burlington was put on notice through the type-written portions of its own bill of lading that Lite-On was to have been notified before delivery to Reveal was attempted. Burlington made no efforts to notify Lite-On.

11. However, Lite-On, prior to delivery, notified Burlington by telephone on January 29, 1996 and faxed letter on February 2, 1996 that the delivery to Reveal was not to have been made, for Reveal's creditworthiness was then in question and the original bill of lading was in Lite-On's possession.

12. Notwithstanding such warning from Lite-On or the terms of its own bill of lading, Burlington delivered the entire shipment to Reveal on or about February 6, 1996.

13. Lite-On was eventually able to recover 2,495 of the 5,000 keyboards from Reveal. However, 2,505 of the items were never recovered.

14. The original invoice prepared by Silitek for the keyboards comprising the entire shipment was issued for the account of Lite-On on January 19, 1996, prior to receipt of the shipment by Burlington, and reflected the

total price for all 5,000 pieces contained in the 1,000 cartons of $202,800.00.

15. As anticipated, Reveal failed to pay Silitek or Lite-On for the misdelivered computer keyboards and subsequently filed bankruptcy.

16. Based upon such invoice, the value of the 2,505 keyboards improperly delivered to Reveal and unrecoverable by Lite-On was $101,602.80.

CONCLUSION OF LAW

1. The assignee of an assignable chose in action takes legal title and may sue in his own name even without a beneficial interest. 4 Witkin, Cal. Procedure (9th ed. 1997) Pleadings, §§108-109, pp. 168-169.

2. Here, as the assignee of Silitek, the party those contract rights under Burlington's bill of lading were breached by Burlington, Lite-On is authorized to pursue recovery for Burlington's wrong.

3. Where a carrier is obligated by its bill of lading terms, as Burlington was in this case, to obtain the bill before delivering the goods, failure to do so constitutes actionable misconduct. See, for example, *Pere Marquette Railway Co. v. J.F. French & Co.*, 254 U.S. 538, 65 L.Ed. 391, 41 S.Ct. 195 (1921) (conversion); *C-Art, Ltd. v. Hong Kong Island Line America*, 940 F.2d 530 (9th Cir. 1991) (misdelivery); *Allied Chemical International Corp. v. Companhia*, 775 F.2d 476 (2d Cir. 1985) (breach of contract and conversion); and *Iowa Beef Processors, Inc. v. Grand Trunk Western Railroad Company*, 493 F.2d 665 (6th Cir. 1974) (misdelivery and conversion).

4. Furthermore, where bills of lading contain language requiring surrender of the bill prior to delivery of the goods, "[a]ny interpretation of the bill of lading, other than one requiring the surrender of a duly endorsed original bill of lading in exchange for the goods, would require this Court to contradict the language of the contract and render this language of the bill of no affect [sic]. Such an interpretation strains credulity." *International Knitwear Company Limited v. M/V Zim Canada,* 1994 WL 924203 (S.D.N.Y. 1994).

5. The language in Burlington's own bill requiring surrender of the endorsed bill before delivery is clear. There exists no reason for this Court to disregard such language or to look beyond the bill to determine the rights and liabilities of the parties.

6. Burlington's argument that, because the goods were shipped F.O.B. point of origin, the consignee named in the bill was the owner of the goods and therefore was entitled to delivery without surrender of the bills of lading, is unfounded. Such an assertion has been rejected by the Ninth Circuit in *C-Art v. Hong Kong, supra,* 940 F.2d 530. There the Court stated that "this argument is inimical to the express provisions of the bill of lading, as well as contradictory to the applicable authorities."

7. Based upon the weight of authority, Burlington's delivery of the goods to Reveal without obtaining the endorsed bill of lading constitutes actionable breach of contract, misdelivery and/or conversion.

8. The basic recovery under any of the theories propounded by Lite-On is the value of the property with interest. See, for example, California Civil Code §3336

(conversion); Civil Code §3300 (breach of contract); and *Metetio Sea Food Co. v. Gordons Transport*, 191 S.W. 2d 983 (Mo. App. 1946), among others (misdelivery of cargo).

9. Lite-On is therefore entitled to recover from Burlington the sum of $101,602.80 plus interest and costs of suit.

Dated: November 23, 1999

RUSSELL, HANCOCK, JEFFRIES & GASTON LLP

By: /s/ KATHLEEN C. JEFFRIES
Kathleen C. Jeffries
Attorneys for Plaintiff
LITE-ON PERIPHERALS, INC.

IT IS SO ORDERED 11/30/99

Dated Sp Letts

United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LITE-ON PERIPHERALS, INC., a Corporation, Plaintiff-Appellee v. BURLINGTON AIRE EXPRESS, INC., a Corporation, dba Burlington Ocean Services, Defendant-Appellant, and DOES 1 THROUGH 10, inclusive, Defendant.	[FILED AUG – 1 2001 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS] No. 99-57003 D.C. No. CV98-07709 JSL ORDER

Before: HUG, TROTT, and W. FLETCHER, Circuit Judges.

The Appellee is requested to file a response (50 copies) to Appellant's petition for rehearing and petition for rehearing en banc filed July 24, 2001. The response shall not exceed fifteen (15) pages and shall be filed within fourteen (14) days from the filed date of this Order. The panel is cognizant of the importance of this matter to the transportation industry and hopes that the

parties will keep this in mind in addition to the goal of winning a case.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LITE-ON PERIPHERALS, INC., a Corporation, Plaintiff-Appellee, v. BURLINGTON AIRE EXPRESS, INC., a Corporation, dba Burlington Ocean Services, Defendant-Appellant and DOES 1 THROUGH 10, inclusive, Defendant.	[FILED AUG 31 2001 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS] No. 99-57003 D.C. No. CV98-07709 JSL ORDER

Before: HUG, TROTT, and W. FLETCHER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, and to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc, are DENIED.

APPENDIX F

Constitutional and Statutory Provisions Involved

U.S. CONST. art. I, § 8 (in relevant part):

The Congress shall have Power . . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337(a):

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of any action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

Cal. U. Com. Code § 1201(6):

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and that, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. Designation of a document by the issuer as a "bill of lading" is conclusive evidence of that intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or

rail transportation, and includes an air consignment note or air waybill.

CAL. U. COM. CODE § 1201(15):

(15) "Document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, or compress receipt, and any other document that, in the regular course of business or financing, is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document shall purport to be issued by a bailee and purport to cover goods in the bailee's possession that either are identified as or are fungible portions of an identified mass.

CAL. U. COM. CODE § 1201(20):

(20) . . . "Holder," with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

CAL. U. COM. CODE § 2401(2):

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

CAL. U. COM. CODE § 7104:

Negotiable and nonnegotiable warehouse receipt, bill of lading, or other document of title

(1) A warehouse receipt, bill of lading or other document of title is negotiable

(a) If by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) Where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

(3) A nonnegotiable warehouse receipt and a nonnegotiable bill of lading must be conspicuously (Section 1201) marked "nonnegotiable." In case of the bailee's failure to do so, a holder of the document who purchased it for value supposing it to be negotiable may, at his option, treat such document as imposing upon the bailee the same liabilities he would have incurred had the document been negotiable.

CAL. U. COM. CODE § 7403:

Obligation of warehouseman or carrier to deliver; Excuse

(1) The bailee must deliver the goods to a person entitled under the document who complies with subdivisions (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) Damage to or delay, loss or destruction of the goods for which the bailee is not liable, but the burden of establishing negligence in case of damage or destruction by fire is on the person entitled under the document;

(c) Previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) The exercise by a seller of his right to stop delivery pursuant to the provisions of the division on sales (Section 2705);

(e) A diversion, reconsignment or other disposition pursuant to the provisions of this division (Section 7303) or tariff regulating such right;

(f) Release, satisfaction or any other fact affording a personal defense against the claimant;

(g) Any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under subdivision (1) of Section 7503, he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery

thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.

CAL. U. COM. CODE § 7501:

Form of negotiation and requirements of "due negotiation"

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2)(a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value.

(5) Indorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

Supreme Court, U.S.
FILED
JAN 18 2002
CLERK

No. 01-768

IN THE

Supreme Court of the United States

BURLINGTON AIR EXPRESS, INC.,
Petitioner,

v.

LITE-ON PERIPHERALS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Having issued a "Negotiable Combined Transport Bill of Lading" which encompassed both maritime and inland transportation of a shipment moving in the foreign commerce of the United States, how can petitioner possibly disclaim the federal subject-matter jurisdiction that was expressly admitted in its answer below?

2. May a carrier resort to state laws governing title to goods as a means of avoiding its self-assumed, self-drafted, contractual obligation to deliver an international shipment only upon surrender of a duly endorsed bill of lading?

3. When a carrier drafts its own bill of lading so as to designate the consignor of goods as a "Merchant" and a party to the bill, may the carrier resort to a pricing agreement with another party as a means of disavowing its contractual obligations to the consignor?

4. Did the Court of Appeals do anything more remarkable or adventuresome than merely holding a carrier to its own contractual obligation with respect to maritime and inland transportation of an international shipment, thus applying settled law in an unquestioned zone of federal supremacy?

STATEMENT PURSUANT TO RULE 29.6

Respondent Lite-On Peripherals, Inc. is a wholly-owned subsidiary of Silitek Corporation, which is a publicly traded company organized under the laws of the Republic of China (Taiwan).

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IN THE

Supreme Court of the United States

No. 01-768

BURLINGTON AIR EXPRESS, INC.,
Petitioner,

v.

LITE-ON PERIPHERALS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

For the reasons stated in this brief, respondent Lite-On Peripherals, Inc. respectfully submits that the petition should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Because the Court of Appeals correctly characterized this as a "straightforward contract case," *see* Appendix A to petition, Pet.App. 5, this Court may disregard most of the multitude of constitutional and statutory provisions cited and reproduced in the petition. Of all those provisions, only four have any pertinence here. All of these are reprinted in Appendix F to the petition, Pet.App. 26-27. The first is the Commerce Clause, under which "[t]he Congress shall have power . . . to regulate Commerce with foreign Nations. . ."

U.S.CONST. art. I, § 8. The second is the Admiralty Grant, under which "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S.CONST. art. III, § 2, cl. 1. The third and fourth are 28 U.S.C. §§ 1331 and 1337, which respectively give the federal district courts original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States" and of "any civil action or proceeding arising under any Act of Congress regulating commerce [subject to certain jurisdictional threshold amounts not at issue here]." For reasons to be stated in this brief, the California statutory provisions quoted at length in the petition are irrelevant to this case.

Petitioner's answer to the complaint in the district court admitted federal jurisdiction under 28 U.S.C. § 1337. Although not discussed by either party below, 28 U.S.C. § 1333 (relating to maritime and admiralty cases) appears to provide a further basis for federal subject-matter jurisdiction, in view of petitioner's admitted status as an ocean transportation intermediary (Pet. 2) and in view of the fact that the shipment at issue moved primarily on an oceangoing vessel. *See* Part 1 of Argument *infra*.

STATEMENT OF THE CASE

1. The Statement of the Case by Petitioner Burlington Air Express, Inc. (renamed BAX Global Inc. during the pendency of this litigation) is replete with incorrect statements and characterizations of the facts, issues, pleadings and judicial decisions in this case. Contrary to petitioner's assertion (Pet. 2), this case is not about "whether respondent had title" to certain computer keyboards shipped from Taiwan to California. Instead, as the Court of Appeals recognized, this is a "straightforward contract case" arising from petitioner's failure to comply with a surrender-on-delivery clause in the bill of lading *drafted by petitioner itself* (Pet.App. 5). Under

that clause, petitioner had agreed that "the keyboards would not be turned over to the named consignee . . . unless the consignee produced an endorsed bill of lading" (Pet.App. 5).

2. Respondent initiated the civil action below as assignee of the rights of its Taiwanese parent company, Silitek Corporation ("Silitek"), which was the consignor named in the bill of lading for the keyboards. Respondent sued petitioner in the United States District Court for the Central District of California, invoking federal subject-matter jurisdiction over this shipment of goods in foreign commerce. The complaint alleged breach of contract, misdelivery of goods, negligence and conversion. It further stated that petitioner's failure to abide by the surrender-on-delivery clause in its own bill of lading had resulted in a loss of over $100,000 because the consignee failed to pay Silitek for the keyboards improperly delivered by petitioner. While petitioner's answer denied liability, *it expressly admitted the existence of subject-matter jurisdiction in federal court.*

3. In connection with receiving the shipment at issue in January 1996, petitioner issued a bill of lading under its "Burlington Ocean Services" trade name, utilizing its own standard-form Negotiable Combined Transport Bill of Lading. The bill of lading (reproduced in Appendix A to this brief) showed that the shipment consisted of 1,000 cartons containing 5,000 keyboards consigned from Silitek in Keelung, Taiwan and consigned to Reveal Computer Products ("Reveal") in Chatsworth, California. According to information typed on the front of the bill, the shipment moved on an oceangoing vessel known as the Ming Plenty from Taiwan to the Port of Los Angeles. Final delivery presumably was accomplished by truck to Chatsworth, an inland section of the city of Los Angeles some 40 freeway miles northwest of the port.

4. The plain words of the surrender-on-delivery clause on the front of petitioner's bill of lading read as follows:

> One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods.

Despite the presence of this language on the face of its own bill, petitioner admittedly delivered the entire shipment of keyboards to Reveal in February 1996 without obtaining a copy of the bill, endorsed or otherwise. *See* paragraph 7, *infra* and Pet.App. 4.

5. As recounted by the Court of Appeals, Reveal failed to pay Silitek or respondent for the keyboards. Respondent eventually was able to recover approximately half of the 5,000 keyboards. The value of the keyboards that could not be recovered came to $101,602.80. With Reveal ultimately having sought protection under the bankruptcy laws, this amount stands as Silitek's and respondent's loss resulting from petitioner's misdelivery. Pet.App. 4.

6. Based on the foregoing facts and circumstances, and after full briefing on cross-motions for summary judgment, the district court granted summary judgment in favor of respondent for $101,620.80 plus interest and costs. The Court of Appeals affirmed in a published opinion reproduced at Pet.App. 1-13. Petitioner sought certiorari after its petitions for rehearing and rehearing en banc were denied by the Court of Appeals. Pet.App. 24-25.

7. *At no time has petitioner denied that it failed to comply with the surrender-on-delivery clause of its own bill of lading.* In fact, petitioner *expressly admitted its non-compliance* in its Statement of Genuine Issues in Opposition to Plaintiff's Motion for Summary Judgment filed with the district court. In that document, petitioner was required to respond to each of the statements of fact in respondent's motion, including numbered items 5, 7 and 8 (asserting respectively that petitioner issued a bill of lading, that the bill contained a

surrender-on-delivery clause, and that petitioner nonetheless delivered to Reveal without obtaining the bill). As to each of these numbered items, petitioner's response was "Admitted."

8. Petitioner has tried to excuse its admitted noncompliance with the surrender-on-delivery clause on grounds that title to the goods passed to Reveal at origin (Pet. 8-26), and that petitioner's only contractual obligations were to Reveal under a separate "Rate and Service Agreement" with that entity (Pet. 5). Most recently, petitioner has even tried to back away from its threshold admission that the district court had subject-matter jurisdiction (Pet. 2, 26-29). Each of these diversionary arguments must be rejected.

9. Contrary to petitioner's repeated assertions before this Court and below, this case does not in any way concern a claim or issue of title. At no time during the pendency of this action did respondent ever assert title to the goods on behalf of itself or Silitek, nor claim that the goods should be delivered to respondent or redelivered to Silitek, nor even claim that respondent was a party to the bill of lading. To the contrary, all that respondent ever sought to do was to *prevent* the goods from being turned over to Reveal in violation of the surrender-on-delivery clause. Moreover, respondent at all times made clear that it takes its right of recovery not under any title theory, but through an assignment of a chose in action from Silitek, the consignor named on the bill of lading.

10. Nor is there any substance to petitioner's argument (apparently pressed with more vigor before the Court of Appeals than here, *see* Pet.App.6-10) that its only pertinent contractual relationship was with Reveal under a Rate and Service Agreement executed in May 1995. While that agreement contains no surrender-on-delivery clause, the record resoundingly refutes any claim that this was the sole or

paramount contractual relationship with regard to the shipment at issue. This is true for at least the following three reasons:

First, as the Court of Appeals observed (Pet.App. 7-8), petitioner cannot deny the contractual nature of its own bill of lading, which does contain the surrender-on-delivery clause. The text of the bill clearly imposes a detailed series of contractual obligations on both petitioner and a group of parties collectively labeled as the "Merchant," and also *defines the latter term to include the consignor.* Although the record below contains only imperfect reproductions of the bill of lading, the copy reproduced and enlarged in Appendix A to this brief will permit the Court to satisfy itself as to the correctness of the Court of Appeals' observations. *See, e.g.,* "DEFINITIONS" section and obligations assumed by "Merchant" under clauses 3.1, 4.1, 5.2, 13, 14.4 and 14.5 of the "CONDITIONS."

Second, Petitioner has identified no clause in its bill of lading that would incorporate an extraneous Rate and Service Agreement into the bill, much less subordinate the bill to such an agreement. Nor has petitioner suggested that Silitek or respondent had actual knowledge of the existence or terms of any agreement between petitioner and Reveal, much less that they consented to be bound by such an agreement.

Third, the text of the Rate and Service Agreement itself refutes petitioner's claim that this instrument was paramount. The record below contains an excellent copy of the Rate and Service Agreement, which is reproduced for the Court's convenience in Appendix B to this brief. The Court's attention is invited to the dispositive language of paragraph 10 in Appendix B (emphasis supplied):

> For other points not contained herein in tendering freight to Burlington Air Express, Reveal Computer

> Products agrees to be bound to the terms and conditions in Burlington's airbill, *ocean bill of lading,* tariffs and service guide.

Because the Rate and Service Agreement self-evidently contains no language addressing the delivery obligations of any party, resort must be had to the bill of lading which does contain such language. The bill of lading takes precedence as to delivery obligations; it does contain a surrender-on-delivery clause; and it is binding on and enforceable by all parties to the shipment, not just petitioner and Reveal.

11. Finally, petitioner's latter-day challenge to federal subject-matter jurisdiction over this case is incomprehensible. The case patently turns on the interpretation of a contract for maritime and inland transportation in the foreign commerce of the United States. As the Argument in this brief will demonstrate, it is beyond doubt that such matters are within the purview of federal courts.

ARGUMENT

I. THE DECISION BELOW REFLECTS A PERFECTLY ORDINARY EXERCISE OF FEDERAL JURISDICTION OVER FOREIGN COMMERCE

As pointed out *supra*, petitioner admitted in its answer below that federal subject-matter jurisdiction existed under 28 U.S.C. § 1337, relating to actions arising under "any Act of Congress regulating commerce." Furthermore, petitioner apparently admits that the Carriage of Goods By Sea Act, 46 U.S.C. app. §§ 1300-1315 ("COGSA") applied to at least the maritime portion of the transportation involved here (Pet. 8-9). Petitioner thus should not be heard to make an eleventh-hour suggestion, as it does at Pet. 26-29, that there is no federal subject-matter jurisdiction over this case.

Wholly aside from the applicability of 28 U.S.C. §§ 1331 and 1337, it is apparent that subject-matter jurisdiction exists under the "admiralty or maritime" provisions of 28 U.S.C.

§ 1333. A suit "lies within [the federal courts'] admiralty jurisdiction" and "is governed by federal maritime law" when it "involves claims by a shipper against an ocean carrier arising from an alleged breach of a contract of carriage." *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 481 (2d Cir. 1985), *cert. denied* 475 U.S. 1099 (1986) (citing *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 807 (2d Cir. 1971) and *David Crystal, Inc. v. Cunard S.S. Co.*, 339 F.2d 295, 298 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965)). In other words, a "shipment of goods by sea" is precisely "the sort of traditional maritime activity which falls squarely within the district court's admiralty jurisdiction." *Genetics Int'l v. Cormorant Bulk Carriers, Inc.*, 877 F.2d 806, 808 (9th Cir. 1989) (citing 1 *Benedict on Admiralty*, §§ 181, 182 p. 12-4 (7th ed. 1989)). *See also J.B. Effenson Co. v. Three Bays Corp.*, 238 F.2d 611, 615 (5th Cir. 1956).

In this case, respondent's assignor is a shipper (Silitek) claiming breach of a contract of carriage involving shipment of goods by sea.[1] It is immaterial that petitioner did not directly operate the oceangoing vessel which carried the computer keyboards (Pet. 2). As an "ocean transportation intermediary" (Pet. 2) which issued a bill of lading for the keyboards, petitioner acted in the capacity of a non-vessel-operating common carrier or NVOCC within the meaning of 46 U.S.C. app. § 1702(17)(B). "Generally, an NVOCC combines the goods of various shippers into a single shipment, contracts with the vessel for the transportation of the goods, and delivers the goods to the vessel, usually in a sealed container." *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1429 (9th Cir. 1993) *cert. denied* 510 U.S.

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[1] As the assignee of an assignable chose in action, respondent took legal title and was permitted to sue in its own name even without a beneficial interest. 4 Witkin, Cal. Procedure (9th ed. 1997) Pleadings, §§ 108-09, pp. 168-69.

1194 (1994) (citing *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 496 n.8 (1980)). An NVOCC "is considered a carrier in its relationship with the shipper of the goods." *All Pacific Trading*, 7 F.3d at 1430 (citing *National Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989)). *See also M. Prusman Ltd. v. M/V Nathanel*, 670 F.Supp. 1141, 1143 (S.D.N.Y. 1987) (NVOCC is a "carrier" for purposes of the cargo liability provisions of COGSA).

Given petitioner's obvious involvement in "traditional maritime activity which falls squarely within the district court's admiralty jurisdiction," petitioner's claim that the lower courts somehow usurped State authority in this case is puzzling in the extreme. While it is self-evident that completing the delivery to Reveal required a few miles of inland transportation as well as thousands of miles of maritime transportation, it does not follow (as suggested at Pet. 9) that State law suddenly became paramount the minute this shipment of keyboards in foreign commerce was "discharged from the ship." Because the bill of lading defined petitioner's service obligations for "combined transport" on a door-to-door basis, *i.e.*, for a continuous international journey from Taiwan to Chatsworth, the surrender-on-delivery clause continued to apply after offloading from the vessel.

Moreover, resort to inland transportation law would not aid petitioner's efforts to deploy State title-to-goods statutes as a shield against its obligations under the bill of lading. Assuming final delivery by truck, the preemption provisions of 49 U.S.C. § 14501(c) would preclude enforcement of any State law "related to a price, route or service" of the motor carrier. In construing virtually identical preemption language applicable to airlines, *see* 49 U.S.C. § 41713(b), this Court has held that States are precluded from "enlargement or enhancement" of price, route or service contracts between carriers and their customers through imposition of "state

laws or policies external to the agreement." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). The result sought by petitioner here would enlarge the rights of Reveal, and diminish those of Silitek and respondent, through imposition of State policies that are not only external to, but repugnant to, the "privately ordered obligations," *Wolens* at 228, appearing in the surrender-on-delivery clause of the bill of lading.

II. TITLE TO THE GOODS WAS IRRELEVANT TO PETITIONER'S OBLIGATION UNDER THE SURRENDER-ON-DELIVERY CLAUSE

It is simply beyond question that a maritime or inland carrier is liable for misdelivery or conversion when it delivers goods in violation of a surrender-on-delivery clause in the bill of lading, and such delivery results in loss to the shipper as it did here. *Pere Marquette Ry. Co. v. J.F. French & Co.*, 254 U.S. 538, 546 (1921); *Iowa Beef Processors, Inc. v. Grand Trunk Western R. Co.*, 493 F.2d 665 (6th Cir. 1974); *Allied Chemical International Corp.*, 775 F.2d at 478-79, 481-82; *C-ART, Ltd. v. Hong Kong Islands Line America, S.A.*, 940 F.2d 530, 533 (9th Cir. 1991), *cert. denied* 503 U.S. 1005 (1992). The Second Circuit in *Allied Chemical* compellingly explained the reason for this rule (775 F.2d at 481-482):

> The liability question in this case inextricably involves the critical importance of the documentary transaction in overseas trade. *See generally* G. Gilmore & C. Black, The Law of Admiralty 110-12 (2d ed. 1975). The documentary sale enables the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of the goods until he has paid for them. It accomplishes this rather simply. The seller tenders shipping documents, including a negotiable bill of lading, rather than goods to the buyer. By paying for the documents, the buyer gets possession of the original bill of lading. * * *

> Absent a valid agreement to the contrary, the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading. "Delivery to the consignee named in the bill of lading does not suffice to discharge the [carrier] where the consignee does not hold the bill of lading." 2 T.G. Carver, Carriage by Sea para. 1593 (R. Colinvaux 13th ed. 1982). * * *
>
> The dispute herein involved precisely the consequence that the documentary transaction is intended to avert: [a consignee], which turned out to be an insolvent buyer, was given possession of goods for which it had not paid.

Petitioner makes much of the fact that the terms of sale of the computer keyboards in this case apparently called for title to pass at origin. Here, however, just as in *C-ART,* "[t]his argument is inimical to the express provisions of the bill of lading, as well as contrary to the applicable authorities." 940 F.2d at 533. *See also International Knitwear Co. v. M/V Zim Canada*, 1994 U.S. Dist. LEXIS 14180, 1997 A.M.C. 1290 (S.D.N.Y. 1994) and *Datas Indus. Ltd. v. OEC Freight (HK) Ltd.*, 2000 U.S. Dist. LEXIS 15589 (S.D.N.Y. Oct. 20, 2000), both of which enforced surrender-on-delivery clauses despite contentions that some or all of the involved bills of lading were straight bills, *i.e.* non-negotiable documents incapable of conveying title.

As drafted by petitioner in its own bill of lading, the surrender-on-delivery clause is unqualified by any conditions addressing sales terms for, or title to, the goods being transported. It is well-established that "ocean bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier." *Allied Chemical International,* 775 F.2d at 482 (citing *The Caledonia*, 157 U.S. 124, 137 (1895); *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931) (L. Hand, J.); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 822-23 (2d Cir. 1981), and *West India Indus, Inc. v. Tradex*, 664 F.2d 946, 951 n.9 (5th Cir. 1981)).

Moreover, there is no sound reason in law or policy for reading title-to-goods provisos into the plain language of the surrender-on-delivery clause. While the record does not indicate why Silitek entered into such risky sales terms with Reveal, the existence of such terms obviously makes enforcement of the surrender-on-delivery clause more important than ever as a last line of defense for a shipper who wants to be paid for the goods. While the surrender-on-delivery clause may have the effect of delaying or even preventing delivery to a party claiming title to the goods, this is not an unusual situation in the realm of transportation law. Common examples include general average (the doctrine allowing sacrifice of a portion of a ship's cargo in order to save the rest under emergency circumstances, *see Ralli v. Troop*, 157 U.S. 386 (1895)) and a carrier's common-law, contractual or statutory lien on goods to secure payment of its freight charges (*see, e.g.*, clause 15 of the bill of lading here, as reproduced in Appendix A). If petitioner had not been paid for its transportation services here, presumably it would have exercised its lien without ostentatious agonizing over who had title to the goods.

It bears repeating that neither respondent nor Silitek ever asked petitioner to deliver the goods to them. They asked only that petitioner honor the surrender-on-delivery clause by *not* delivering to Reveal unless and until that entity could produce the bill of lading as evidence that it had paid for the goods. Petitioner has inundated this Court with historical exegesis about the importance of uniformity in commercial law (as if the federal maritime and commerce jurisdiction did not already promote such uniformity), and has furnished statistics showing generally that a whole lot of containerized cargo moves through East Coast and West Coast ports (Pet. 15-19). The Court should give no credence, however, to petitioner's implication that adherence by carriers to surrender-on-delivery clauses would reduce the Nation's commerce to a chaotic shambles. As a familiar fact of com-

mercial life, delivery problems commonly are anticipated and dealt with in the bill of lading itself. Under clause 12 of the bill of lading here, for example, petitioner could and should have notified respondent or Silitek to request further instructions when Reveal could not produce the bill. The provision making the "Merchant" (including the consignor) liable for storage charges upon failure of delivery would have given Silitek and respondent every incentive to press Reveal for payment or otherwise to resolve the situation. *See* Appendix A.

Contrary to petitioner's contention, the outcome of this case would be commercially intolerable only if carriers could take it upon themselves to sit as kangaroo courts of title, choosing to enforce or disregard surrender-on-delivery clauses depending on their own notions as to what the sales and credit terms might be for the goods being transported. Consequently, the strict enforcement of the surrender-on-delivery clause by the district court and the Court of Appeals in this case represents sound policy as well as good law.

In a further effort to avoid enforcement of the surrender-on-delivery clause, petitioner claims that "[o]nly the 'holder' of a negotiable bill may enforce the bill as a contract" (Pet. 11 n.1). The decision it cites, however, stands only for the proposition that holders are *among* the parties who may seek such enforcement, and contains no language that would preclude *other* parties to the bill from enforcing it. *See Oliver Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878, 879 (2d Cir.), *cert. denied*, 283 U.S. 856 (1931). By the plain words of the bill of lading here (Appendix A), the parties entitled to enforce it included all entities encompassed by the term "Merchant," and one such entity was Silitek (the consignor and respondent's assignor). *See All Pacific Trading*, 7 F.3d at 1432 (according party status to all entities included in similar bill-of-lading definition of "Merchant").

III. THE RATE AND SERVICE AGREEMENT BETWEEN PETITIONER AND THE BANKRUPT CONSIGNEE WAS IRRELEVANT TO PETITIONER'S OBLIGATION UNDER THE SURRENDER-ON-DELIVERY CLAUSE

Petitioner continues to insist that the sole or primary contract under which it transported the keyboards was not the bill of lading, but rather its "long-term rate and service agreement with Reveal" (Pet. 2-3). That position is untenable in view of three points already demonstrated by this brief. First, the Rate and Service Agreement (*see* Appendix B) ran only between petitioner and Reveal, whereas the bill of lading accorded party status to all entities with an interest in the shipment. Second, the Rate and Service Agreement was silent as to the delivery responsibilities of petitioner, whereas the bill of lading included a surrender-on-delivery clause. Third, as to all issues not covered in the Rate and Service Agreement (including delivery responsibilities), paragraph 10 of that instrument expressly made it *subordinate to petitioner's bill of lading.*

An early decision of this Court suggests that "the bill of lading alone can be considered as the contract" for an ocean shipment. *See The Caledonia,* 157 U.S. at 139. Today's Court, however, need not go so far in order to recognize that the bill of lading defines petitioner's obligations insofar as delivery is concerned. In particular, petitioner cannot bring itself within the circumstances under which lower courts in recent years have allowed maritime bills of lading to be modified or supplemented by other documents. The case presented here is precisely the opposite of *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196 (2d Cir. 1975), in which the *bill of lading* was silent on the pertinent issue and other documents filled the gap. 512 F.2d at 1207-08. Similarly inapposite are cases such as *Hellenic Lines, Ltd. v. Embassy of Pakistan*, 467 F.2d 1150 (2d Cir. 1972), in which the *bill of lading* contained language subordinating it to other docu-

ments, 467 F.2d at 1155, and *Hellenic Lines, Ltd. v. Director General of India Supply Mission*, 452 F.2d 810 (2d Cir. 1971), in which the other document (a contract of affreightment) contained explicit language relegating bills of lading to a subordinate position, 452 F.2d at 814.

Rather, this case is more like *International Drilling Co. v. The M/V Doriefs*, 291 F.Supp. 479 (S.D. Tex. 1968). There, the contract of affreightment (like the rate and service agreement here) contained language subordinating it to the bill of lading. *International Drilling*, 291 F.Supp. at 482. Consequently, the affreightment contract was enforceable only between the parties who executed it (which did not include the ship). *Id.* at 483-484. To similar effect is *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527 (2d Cir. 1975), *cert. denied* 423 U.S. 1054 (1976). There an arbitration clause appeared in the charter party, but not in the "fixture telex" which was held to be the paramount agreement on the facts of that case. Because the guarantor was not a party to the inferior document which contained the arbitration clause, the Second Circuit held that the guarantor must be excluded from the order compelling arbitration. *Interocean Shipping*, 523 F.2d at 534, 537-539.

So it is here, where the inferior document is the Rate and Service Agreement. While petitioner may be able to enforce that agreement as against Reveal (depending on the course and outcome of Reveal's bankruptcy case), this does not affect the status of the bill of lading as the paramount document binding all the parties to the shipment here. Thus, the surrender-on-delivery clause in the bill of lading was enforceable against petitioner by respondent (as assignee of consignor Silitek) regardless of the rights of petitioner and Reveal under their Rate and Service Agreement. The district court properly so found, and properly was affirmed by the Court of Appeals. There is no discernible reason for this Court to disturb the outcome below.

CONCLUSION

Reduced to its essence, the petition amounts to a facile but failed effort to dilute petitioner's plain and simple legal obligations under the surrender-on-delivery clause by resort to "situation ethics."[2] For all the reasons set forth in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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* Counsel of Record

Attorneys for Respondent

[2] J. Fletcher, Situation Ethics: The New Morality (Philadelphia: Westminster Press, 1966).

(COMBINED TRANSPORT BILL OF LADING)

Consignor

SILITEK CORPORATION

B/L NO. TP/LAX95010054

Shipper's Reference 0013

Forwarder's Reference

Consigned to order of

REVEAL COMPUTER PRODUCTS INC
21701 PRAIRIE STREET CHATSWORTH CA 91311

NEGOTIABLE
COMBINED TRANSPORT
BILL OF LADING
issued subject to ICC Uniform Rules for a Combined Transport Document (ICC publication 298)

Notify address

1.LPI
2.REVEAL COMPUTER PRODUCTS INC.

BURLINGTON AIR EXPRESS INC.
dba BURLINGTON OCEAN SERVICES

BURLINGTON OCEAN SERVICES

Container Number	Place of Receipt
Ocean Vessel MING PLENTY 51E	**Port of Loading** KEELUNG, TAIWAN
Port of Discharge LOS ANGELES	**Place of Delivery** LOS ANGELES

Marks and Numbers	Number and Kind of Packages	Description of Goods	Gross Weight	Measurement
		SHIPPER'S LOAD AND COUNT SAID TO CONTAIN		
YMLU4443546/40' CY/CY 828424999	960CARTONS		12.960KGS	58.00CBM
YMLU6106251/40'HQ CFS/CFS	2PALLETS (=40CTNS)		560KGS	3.570CBM
	(962PACKAGES) VVVVVVVVVV		13,520KGS	61.570CBM
REVEAL IN DIA LOS ANGELES P/O#2382 ITEM:07-005-27 C/NO.1-960CTNS P/NO.1A-2A P'LT MADE IN TAIWAN R.O.C.		CONPUTER KEYBOARD "FREIGHT COLLECT" TOTAL: ONE (1) 40' DRY CNTR CONTAINER AND TWO (2) PALLETS ONLY.		
		PCCID NO: EYUR33SK		ON BOARD DATE

BURLINGTON INSPECTION COPY

according to the declaration of the consignor.

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness where of the original Combined Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight Amount	Freight Payable at	Place and date of issue; Stamp and signature
O.F. AS ARRANGED	DESTINATION	TAIPEI TAIWAN R.O.C. JAN.22.1996
Cargo insurance through the undersigned ☐not covered ☐covered according to attached Policy	Number of Original BL's THREE(3)	
For delivery of goods please apply to BURLINGTON AIR EXPRESS 5500 W.CENTURY BLVD. LOS ANGELES, CA 90045 U.S.A. TEL:(310)338-0568 FAX:(310)338-0998 ATTN:GREG WATTS		2/5

BEST AVAILABLE COPY

Standard Conditions governing CONSIGNED TRANSPORT BILLS OF LADING

Definitions "Merchant" means and includes the Shipper, the Consignee, the Consignor, the Holder of the Bill of Lading, the Receiver and the Owner of the Goods. "The Freight Forwarder" means the issuer of the Bill of Lading as named on the face of it

The headings set forth below are for easy reference only.

CONDITIONS

1. Applicability
Notwithstanding the heading "Combined Transport Bill of Lading", the provisions set out and referred to in this document shall also apply if the transport not designated on the face of the Bill of Lading, is performed by one mode of transport only.
2. Definition of the "Combined Transport Bill of Lading"
2.1 By the issuance of the "Combined Transport Bill of Lading", the Freight Forwarder undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge as the place designated for delivery in the Bill of Lading
[illegible] Bill of Lading Conditions
2.2 For the purposes and subject to the provisions of the Bill of Lading, the Freight Forwarder shall be responsible for the acts and omissions of any person of whose services he makes use for the performance of the contract evidenced by the Bill of Lading.
3. Responsibility and title on the goods
3.1 By delivering the Bill of Lading the Merchant and his transferees agree with the Freight Forwarder that, unless it is marked "non-negotiable", it shall constitute title to the goods, and the holder, by endorsement of the Bill of Lading, shall be entitled to receive or to transfer the goods thereon mentioned.
3.2 The Bill of Lading shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as therein described. However, proof to the contrary shall not be admissible when the Bill of Lading has been negotiated or transferred for valuable consideration to a third party acting in good faith.
4. Dangerous Goods and Indemnity
4.1 The Merchant shall comply with rules which are mandatory according to the national law or by reason of International Conventions, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him if need be, the precautions to be taken
4.2 If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the appropriate precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation, and the Merchant shall be liable for all loss, damage, delay or consequences arising out of their being taken in charge, or their carriage, or of any service rendered thereto
The burden of proving the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest upon the person putting in the goods.
4.3 If any goods shipped with the knowledge of the Freight Forwarder as to their dangerous nature shall become a danger to the vehicle or cargo, they may in the manner be unloaded or landed at any place or destroyed or rendered harmless by the Freight Forwarder without liability on the part of the Freight Forwarder, except to General Average, if any
5. Description of Goods and Merchant's Packing
5.1 The Merchant shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of the description of the goods, marks, number, quantity, weight and/or volume as furnished by him, and the Consignor shall indemnify the Freight Forwarder against all loss, damage and expenses arising or resulting from inaccuracies in or inadequacy of such particulars. The right of the Freight Forwarder to such indemnity shall in no way limit his responsibility and liability under the Bill of Lading to any person other than the Consignor
5.2 Without prejudice to Clause 8 (A) (2) (c), the Merchant shall be liable for any loss, damage or expense caused by faulty or inadequate packing of goods or by faulty loading or packing which packing and loading and/or bale when such loading or packing has been performed by the Merchant or on behalf of the Merchant by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers, trailers or rails, which supplied by the Merchant, and shall indemnify the Freight Forwarder against any additional expenses so caused.
6. Extent of Liability
A 1) The Freight Forwarder shall be liable for loss of or damage to the goods occurring between the time when he takes the goods into his charge and the time of delivery
2) The Freight Forwarder shall, however, be relieved of liability for any loss or damage if such loss or damage was caused by,
a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or whom the Freight Forwarder took the goods in charge;
b) insufficiency or defective condition of the packaging or marks (other numbers)
c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant,
d) wastage in bulk or weight,
e) inherent vice of the goods,
f) war, warlike, blockade or restraint of kings, the consequences of which the Freight Forwarder could not avoid by the exercise of reasonable diligence,
g) any cause or event which the Freight Forwarder could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence,
h) a matter covered by the sections of a railway undertaking or a person using for hire a ship by the damage under an applicable International Convention or national law governing liability on analogous carriage.
3) The burden of proving that the loss or damage was due to one or more of the above causes of relief shall rest upon the Freight Forwarder
When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in (a) to (h) above, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of these causes or events.
B When in accordance with clause 6 A 1 the Freight Forwarder is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the Freight Forwarder in respect of such loss or damage shall be determined by the provisions contained in any international Convention or national law, which compulsorily
(i) cannot be departed from by private contract, to the detriment of the claimant, and
(ii) would have applied if the Claimant had made a separate and direct contract with the Freight Forwarder in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international conventions or national law applicable.
7. Paramount Clause
The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where they are already in force the Hague Visby Rules contained in the Protocol of Brussels, dated February 23rd 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and, where no mandatory international or national law applies, to the carriage of goods by inland waterways also, and such provisions shall apply to all goods whether carried on deck or under deck

8. Limitation Amount
8.1 When the Freight Forwarder is liable for compensation in respect of loss of or damage to the goods, such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the Consignee in accordance with the contract or should have been so discharged.
8.2 The value of the goods shall be fixed according to the current commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.
8.3 Compensation shall not, however, exceed 2 SDR (Special Drawing Rights) per kilo of gross weight of the goods lost or damaged, unless, with the consent of the Freight Forwarder, the Merchant has declared a higher value for the goods and such higher value has been stated in the CT Bill of Lading, in which case such higher value shall be the limit. However, the Freight Forwarder shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim.
9. Delay, Consequential Loss, etc.
Animal losses are not guaranteed by the Freight Forwarder. If the Freight Forwarder is held liable in respect of delay, consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to double the freight for the transport covered by the Bill of Lading, or the value of the goods as determined in Clause 8, whichever is the less.
10. Delivery
10.1 The defenses and limits of liability provided for in these Conditions [illegible] against the Freight Forwarder for loss of or damage or delay to the goods whether the action be asserted in contract or in tort.
10.2 The Freight Forwarder shall not be entitled to the benefit of the limitation of liability provided for in paragraph 2 of Clause 8 if it is proved that the loss or damage resulted from an act or omission of the Freight Forwarder done with intent to cause damage or recklessly and with knowledge that damage would probably result.
11. Liability of Servants and Sub-contractors
11.1 If an action for loss of or damage to the goods is brought against a person referred to in paragraph 2 of Clause 2, such person shall be entitled to avail himself of the defenses and limits of liability which the Freight Forwarder is entitled to invoke under these Conditions.
11.2 However, it is proved that the loss or damage resulted from an act or omission of the person done with intent to cause damage or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in paragraph 3 of Clause 8.
11.3 Subject to the provisions of paragraph 2 of Clause 10 and paragraph 2 of this Clause, the aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in paragraph 1 of Clause 2 shall in no cases exceed the limits provided for in these Conditions.
12. Method and Route of Transportation
The Freight Forwarder reserves to himself a reasonable liberty as to the means, route and procedure to be followed in the handling, storage and transportation of goods.
13. Delivery
If delivery of the goods or any part thereof is not taken by the Merchant, at the time and place when and where the Freight Forwarder is entitled to call upon the Merchant to take delivery thereof, the Freight Forwarder shall be entitled to store the goods at the port [illegible] of the vessel risk of the Merchant, whose upon the liability of the Freight Forwarder in respect of the goods or that part thereof shall be deemed [illegible] the case may be) shall wholly cease and the cost of such storage (if paid by or payable by the Freight Forwarder or any agent or sub-contractor of the Freight Forwarder) shall forthwith upon demand be paid by the Merchant to the Freight Forwarder.
14. Freight and Charges
14.1 Freight shall be paid in cash without discount and, whether prepayable or payable at destination, shall be considered as earned on receipt of the goods and not to be returned or repaid in any event.
14.2 Freight and all other amounts mentioned in this Bill of Lading are to be paid in the currency named in the Bill of Lading or, at the Freight Forwarder's option in the currency of the country of discharge or destination at the highest rate of exchange for bankers sight bills current for practicable freight on the day of discharge and for freight payable at destination on the day when the steamship is reported or arrived at the agreed place or on the date of withdrawal of the delivery order, whichever rate is the highest, or at the option of the Freight Forwarder on the date of the Bill of Lading
14.3 All duties, taxes and charges or other assessments in connection with the goods shall be paid by the Merchant.
14.4 The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for detention or delay or any other expenses of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government enactment or force majeure.
14.5 The Merchant warrants the correctness of the declaration of contents, valuations, weight, measurements or values of the goods but the Freight Forwarder reserves the right to have the particulars inspected and the weight, measurements or value verified. If on such inspection it is found the declarations are not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder by the respective sums and lashes of freight on all or goods notwithstanding any other sum having been stated on the Bill of Lading as freight payable
15. Lien
The Freight Forwarder shall have a lien on the goods for any amount due under the Bill of Lading including storage fees and for the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.
16. General Average
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder including [illegible]
17. Notice
Unless notice of loss of or damage to the goods and the general nature of such loss or damage be given to the Freight Forwarder at the earliest removal to or [illegible] 2 of Clause 2, at the time of delivery before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the Bill of Lading, or if the loss or damage be not apparent, within seven consecutive days thereafter, such removal shall be prima facie evidence of the delivery by the Freight Forwarder of the goods as described in the Bill of Lading.
18. Non-Delivery
Failure to effect delivery within 90 days after the expiry of a time limit agreed and expressed in a CT Bill of Lading or, where no time limit is agreed and so expressed, failure to effect delivery within 90 days after the time it would be reasonable to allow for proper completion and the customary dispatch operation shall, in the absence of evidence to the contrary, give to the party entitled to receive delivery, the right to treat the goods as lost.
19. Time Bar
The Freight Forwarder shall be discharged of all liability under the rules of these Conditions, unless suit is brought within nine months after
(i) the delivery of the goods, or
(ii) the date when the goods should have been delivered, or
(iii) the date when in accordance with Clause 18, failure to deliver the goods would, in the absence of evidence to the contrary, give to the party entitled to receive delivery, the right to treat the goods as lost.
20. Jurisdiction
Actions against the Freight Forwarder may only be instituted in the country where the Freight Forwarder has his principal place of business and shall be decided according to the law of such country

2a

Exhibit C
Page 2 of 2 Pages

Standard Conditions governing COMBINED TRANSPORT BILLS OF LADING

Definitions "Merchant" means and includes the Shipper, the Consignor, the Consignee, the Holder of the Bill of Lading, the Receiver and the Owner of the Goods. "The Freight Forwarder" means the issuer of this Bill of Lading as named on the face of it

The headings set forth below are for easy reference only.

CONDITIONS

1. **Applicability**
Notwithstanding the heading "Combined Transport Bill of Lading", the provisions set out and referred to in this document shall also apply if the transport as described on the face of the Bill of Lading, is performed by one mode of transport only.

2. **Issuance of the "Combined Transport Bill of Lading"**

2.1 By the issuance of the "Combined Transport Bill of Lading", the Freight Forwarder;
a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge to the place designated for delivery in the Bill of Lading
b) assumes liability as set out in these Conditions

2.2 For the purposes and subject to the provisions of the Bill of Lading, the Freight Forwarder shall be responsible for the acts and omissions of any person of whose services he makes use for the performance of the contract evidenced by this Bill of Lading.

3. **Negotiability and title to the goods**

3.1 By accepting the Bill of Lading the Merchant and his transferees agree with the Freight Forwarder that, unless it is marked "non-negotiable", it shall constitute title to the goods and the holder, by endorsement of the Bill of Lading, shall be entitled to receive or to transfer the goods herein mentioned.

3.2 The Bill of Lading shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as herein described. However, proof to the contrary shall not be admissible when the Bill of Lading has been negotiated or transferred for valuable consideration to third party acting in good faith.

4. **Dangerous Goods and Indemnity**

4.1 The Merchant shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him if need be, the precautions to be taken

4.2 If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation, and the Merchant shall be liable for all loss, damage, delay or expenses arising out of their being taken in charge, or their carriage, or of any service incidental thereto
The burden of proving the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest upon the person entitled to the goods.

4.3 If any goods shipped with the knowledge of the Freight Forwarder as to their dangerous nature shall become a danger to the vehicle or cargo, they may in like manner be unloaded or landed at any place or destroyed or rendered innocuous by the Freight Forwarder, without liability on the part of the Freight Forwarder, except to General Average, if any

5. **Description of Goods and Merchant's Packing**

5.1 The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of the description of the goods, marks, number, quantity, weight and/or volume as furnished by him, and the Consignor shall indemnify the Freight Forwarder against all loss, damage and expenses arising or resulting from inaccuracies in or inadequacy of such particulars. The right of the Freight Forwarder to such indemnity shall in no way limit his responsibility and liability under the bill of lading to any person other than the Consignor

5.2 Without prejudice to Clause 5 (A) (2) (c), the Merchant shall be liable for any loss, damage or injury caused by faulty or insufficient packing of goods or by faulty loading or packing within containers and trailers and on lifts when such loading or packing has been performed by the Merchant or on behalf of the Merchant by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers, trailers or flats, when supplied by the Merchant, and shall indemnify the Freight Forwarder against any additional expenses so caused.

6. **Extent of Liability**

A 1) The Freight Forwarder shall be liable for loss of or damage to the goods occurring between the time when he takes the goods into his charge and the time of delivery

2) The Freight Forwarder shall, however, be relieved of liability for any loss or damage if such loss or damage was caused by,
a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge;
b) insufficiency or defective condition of the packaging or marks and/or numbers;
c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant,
d) inherent vice of the goods,
e) strike, lockout, stoppage or restraint of labour, the consequences of which the Freight Forwarder could not avoid by the exercise of reasonable diligence,
f) any cause or event which the Freight Forwarder could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence,
g) a nuclear incident if the operator of a nuclear installation or a person acting for him is liable for this damage under an applicable international Convention or national law governing liability in respect of nuclear energy.

3) The burden of proving that the loss or damage was due to one or more of the above causes or events shall rest upon the Freight Forwarder
Where the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in b) to d) above, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of these causes or events.

B When in accordance with clause 6 A 1 the Freight Forwarder is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the Freight Forwarder in respect of such loss or damage shall be determined by the provisions contained in any international Convention or national law, which provisions
(i) cannot be departed from by private contract, to the detriment of the claimant, and
(ii) would have applied if the Claimant had made a separate and direct contract with the Freight Forwarder in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable.

7. **Paramount Clause**
The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where they are already in force the Hague Visby Rules contained in the Protocol of Brussels, dated February 23rd 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and, where no mandatory international or national law applies, to the carriage of goods by inland waterways also, and such provisions shall apply to all goods whether carried on deck or under deck

8. **Limitation Amount**

8.1 When the Freight Forwarder is liable for compensation in respect of loss of or damage to the goods, such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the Consignee in accordance with the contract or should have been so delivered.

8.2 The value of the goods shall be fixed according to the current commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

8.3 Compensation shall not, however, exceed 2 SDR (Special Drawing Rights) per kilo of gross weight of the goods lost or damaged, unless, with the consent of the Freight Forwarder, the Merchant has declared a higher value for the goods and such higher value has been stated in the CT Bill of Lading, in which case such higher value shall be the limit. However, the Freight Forwarder shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim.

9. **Delay, Consequential Loss, etc.**
Arrival times are not guaranteed by the Freight Forwarder. If the Freight Forwarder is held liable in respect of delay, consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to double the freight for the transport covered by the Bill of Lading, or the value of the goods as determined in Clause 8, whichever is the less.

10. **Defenses**

10.1 The defenses and limits of liability provided for in these Conditions shall apply in any action against the Freight Forwarder for loss of or damage or delay to the goods whether the action be founded in contract or in tort.

10.2 The Freight Forwarder shall not be entitled to the benefit of the limitation of liability provided for in paragraph 3 of Clause 8 if it is proved that the loss or damage resulted from an act or omission of the Freight Forwarder done with intent to cause damage or recklessly and with knowledge that damage would probably result.

11. **Liability of Servants and Sub-contractors**

11.1 If an action for loss of or damage to the goods is brought against a person referred to in paragraph 2 of Clause 2, such person shall be entitled to avail himself of the defences and limits of liability which the Freight Forwarder is entitled to invoke under these Conditions.

11.2 However, if it is proved that the loss or damage resulted from an act or omission of the person, done with intent to cause damage or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in paragraph 3 of Clause 8.

11.3 Subject to the provisions of paragraph 2 of Clause 10 and paragraph 2 of this Cause, the aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in paragraph 2 of Clause 2 shall in no cause exceed the limits provided for in these Conditions

12. **Method and Route of Transportation**
The Freight Forwarder reserves to himself a reasonable liberty as to the means, route and procedure to be followed in the handling, storage and transportation of goods.

13. **Delivery**
If delivery of the goods or any part thereof is not taken by the Merchant, at the time and place when and where the Freight Forwarder is entitled to call upon the Merchant to take delivery thereof, the Freight Forwarder shall be entitled to store the goods or the part thereof at the sole risk of the Merchant, where upon the liability of the Freight forwarder in respect of the goods or that part thereof stored as aforesaid (as the case may be) shall wholly cease and the cost of such storage (if paid by or payable by the Freight Forwarder or any agent or sub-contractor of the Freight Forwarder) shall forthwith upon demand be paid by the Merchant to the Freight Forwarder.

14. **Freight and Charges**

14.1 Freight shall be paid in cash without discount and, whether prepayable or payable at destination, shall be considered as earned on receipt of the goods and not to be returned or relinquished in any event.

14.2 Freight and all other amounts mentioned in this Bill of Lading are to be paid in the currency named in the Bill of Lading or, at the Freight Forwarder's option in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepayable freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified of arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of the Bill of Lading

14.3 All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.

14.4 The Merchant Shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.

14.5 The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder reserves the right to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damage to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on the Bill of Lading as freight payable

15. **Lien**
The Freight Forwarder shall have a lien on the goods for any amount due under the Bill of Lading including storage fees and for the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

16. **General Average**
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

17. **Notice**
Unless notice of loss of or damage to the goods and the general nature of it be given in writing to the Freight Forwarder or the persons referred to in paragraph 2 of Clause 2, at the place of delivery before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the Bill of Lading, or if the loss or damage be no apparent, within seven consecutive days thereafter, such removal shall be prima facie evidence of the delivery by the Freight Forwarder of the goods as described in the Bill of Lading.

18. **Non delivery**
Failure to effect delivery within 90 days after the expiry of a time limit agreed and expressed in a CT Bill of Lading or, where no time limit is agreed and so expressed, failure to effect delivery within 90 days after the time it would be reasonable to allow for diligent completion of the combined transport operation shall, in the absence of evidence to the contrary, give to the party entitled to receive delivery, the right to treat the goods as lost.

19. **Time Bar**
The Freight Forwarder shall be discharged of all liability under the rules of these Conditions, unless suit is brought within nine months after
(i) the delivery of the goods, or
(ii) the date when the goods should have been delived, or
(iii) the date when in accordance with Cause 18, failure to deliver the goods would, in the absence of evidence to the contrary, give to the party entitled to receive delivery, the right to treat the goods as lost.

20. **Jurisdiction**
Actions against the Freight Forwarder may only be instituted in the country where the Freight Forwarder has his principal place of business and shall be decided according to the law of such country

REVEAL COMPUTER PRODUCTS/BURLINGTON AIR EXPRESS
RATE AND SERVICE AGREEMENT

1. Burlington Air Express agrees to provide services and pricing set forth in the attached addenda 1&2 (original bid submitted March 7, 1995 and Bid Day commitments March 28th, 1995).
Effective May 3, 1995.

2. Pricing is guaranteed for one year after the signing of this document. Rates are guaranteed to be market competitive throughout the term of the agreement. Rates may be raised during the term of the agreement only by mutual consent in response to extraordinary circumstances such as war or extreme economic calamity. Said rate increase will be assessed as a specifically identified surcharge.

3. Reveal Computer Products agrees to use Burlington Air Express for air and ocean shipments from the Far East to the USA.

4. Reveal Computer Products reserves the right to negotiate special rates for special requirement deliveries and/or lane segments on an as needed basis.

5. Reveal Computer Products may discontinue shipping with Burlington Air Express on any lane without prior notice should service quality not meet acceptable standards established by Reveal Computer Products in the bid specification. A statistical method for measuring service will be jointly developed by Reveal Computer Products and Burlington Air Express.

6. Either party may cancel this agreement for any reason with 30-days' written notice.

7. Except to the extent caused by the negligence or willful misconduct of Reveal Computer Products or any of its employees, agents, contractors or suppliers, Burlington Air Express agrees to hold Reveal Computer Products harmless from any and all claims and liability (except for shipments) arising from negligence or non-performance with regard to the execution of this agreement.

8. Any official correspondence notifying the other company of intent to cancel or modify this agreement must be communicated in writing and sent by registered mail or traceable overnight express to the CFO of Reveal Computer Products and/or Corporate Counsel of Burlington Air Express.

9. US import shipments will be billed in US Dollars. Wherever possible, rates will be quoted in US Dollars. If necessary, a mutually acceptable conversion factor will be applied utilizing ratios published in the Wall Street Journal. Exception: Singapore will be quoted at SID 3.58 and Taiwan at 60 NTD which will be converted to U.S. Dollars based on the Wall Street Journal (each Tuesday) and at no currency adjustment factor.
Terms: Net 30 Days

10. For other points not contained herein in tendering freight to Burlington Air Express, Reveal Computer Products agrees to be bound to the terms and conditions contained in Burlington's airbill, ocean bill of lading, tariffs and service guide.

REVEAL COMPUTER PRODUCTS
John Smither
Chief Financial Officer
Date: 5/3/95

BURLINGTON AIR EXPRESS
Dennis Eitreim
Chief Operating Officer-Americas
Date: 5-3-95

Steve Dearnley
Chief Operating Officer/International
Date: 5-5-95

4a
APPENDIX B

Exhibit C
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REPLY

BRIEF

Supreme Court, U.S.
FILED
FEB 1 2002

(3)

No. 01-768

In the

Supreme Court of the United States

BURLINGTON AIR EXPRESS, INC.,

Petitioner,

v.

LITE-ON PERIPHERALS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

A. Respondent's alleged tort and contract claims arose on land and did not concern traditional maritime activity.

The Brief in Opposition responds to petitioner's challenge of the court's commerce jurisdiction by asserting for the first time that respondent's tort and contract claims are within the court's admiralty and maritime jurisdiction. Petitioner replies that the claims do not fall within that jurisdiction because they do not involve traditional maritime activity and they allege breaches of nonmaritime delivery obligations.

In *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 261, 268 (1972), this Court concluded that a tort claim will not fall within the admiralty and maritime jurisdiction unless the activity from which the tort arose bore a substantial relationship to traditional maritime activity. The Court developed this analysis in *Sisson v. Ruby*, 497 U.S. 358 (1990). Under the traditional-maritime-activity requirement explained in these decisions, respondent's tort claims – for negligence and conversion – do not lie within the admiralty and maritime jurisdiction. As the delivery to Reveal on which respondent's claims were based "was accomplished by truck to Chatsworth, an inland section of the city of Los Angeles some 40 freeway miles northwest of the port" (Opp. Brief at 3), these alleged torts were *not* maritime torts, and do not sound within the admiralty and maritime jurisdiction invoked by the Brief in Opposition.

This Court also has dealt with the line demarking maritime and nonmaritime contracts. In *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 612 (1991), this Court

explained that in determining whether a contract is maritime, the court should look to the nature of the services provided by the contract. The Brief in Opposition points out that –

> the bill of lading defined petitioner's service obligations for "combined transport" on a door-to-door basis, *i.e.*, for a continuous international journey from Taiwan to Chatsworth, [and] the surrender-on-delivery clause continued to apply after offloading from the vessel.

Opp. Brief at 9. Respondent asserts that one of petitioner's obligations under the bill of lading was to make "final delivery by truck. . . . " If this final delivery did constitute a breach of contract and misdelivery, as the Ninth Circuit improperly held, then respondent's claims for breach of contract and for misdelivery concern a landside obligation to deliver by truck to a door in Chatsworth, "an inland section of the city of Los Angeles. . . . " Though the bill of lading is a *maritime* contract insofar as it contemplates the transportation of goods by water from Taiwan to Los Angeles, it is a *nonmaritime* contract to the extent that it contemplates final delivery by truck to an inland destination. As the petitioner was held to have breached a land-based delivery obligation, respondent's contract claims – like its tort claims – lie outside the admiralty and maritime jurisdiction. As another court explained:

> [A]dmiralty jurisdiction even with respect to maritime contracts of carriage must end for some reason and at some time. The question is, of course, on what grounds and when. Brocsonic submits that admiralty jurisdiction over a maritime contract may only end upon actual delivery to the rightful consignee – i.e., only after delivery is properly effected. . . . The problem

> with Brocsonic's position is that it confuses the horizon of liability for that of federal jurisdiction. Bills of lading will often continue to govern the rights and obligations of parties long after the paramount element of maritime transport has finished. For instance, the contract of carriage might call for cargo to be shipped via the sea from Vancouver to Hong Kong, and then driven inland by truck to New Delhi. If actual delivery were the test for continuing admiralty jurisdiction, then a traffic accident occurring on the road en route to India would give rise to an admiralty claim in a United States federal court . . . . Brocsonic's interpretation of the law cleaves admiralty jurisdiction from its foundational touchstone of maritime commerce.

Brocsonic, Inc. v. M/V MATHILDE MAERSK, 120 F. Supp. 2d 372, 377 (S.D.N.Y. 2000), *aff'd per curiam*, 270 F.3d 106 (2d Cir. 2001) (substantially adopting district court's reasons).

The alleged tort and contract claims purportedly arose at an inland point at least 40 freeway miles from the water's edge. *See* Opp. Brief at 3, ¶ 3. The latterly invocation of admiralty and maritime jurisdiction is a reflexive response to the petition's inescapable observation that the Carmack Amendment, on which the judgment was based, does not apply to the inland leg of international ocean transportation under petitioner's through bill of lading. *See Capitol Converting Equip., Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992).

B. The Uniform Commercial Code applies in the absence of express federal admiralty law.

By invoking admiralty and maritime jurisdiction at the petition stage, respondent seeks to defeat the argument that a state-law rule of decision governs title to the

goods under petitioner's negotiable bill of lading. Respondent informs the Court that, under a maritime bill of lading, "the California statutory provisions quoted at length in the petition are irrelevant to this case." Opp. Brief at 2.

This is incorrect, as a leading commentary explains. "A negotiable instrument calls for the payment of money and represents a debt. A bill of lading calls for the delivery of goods and represents or covers goods." GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 95 (2d ed. 1975). The law that determines who is entitled to goods arriving in the United States under a negotiable bill of lading is the relevant state's enactment of Article 7 of the Uniform Commercial Code. *Id.* at 95-96.

At least eight federal circuits have applied the Uniform Commercial Code to maritime contracts. *See, e.g., Southwest Machine Co. v. F/V COREY PRIDE*, 994 F.2d 37, 40-41 & n.3 (1st Cir. 1993) (contract to install rebuilt engine on existing vessel); *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970) (letter of credit securing performance of ship charter-party obligations); *Ridings v. The Motor Vessel EFFORT*, 387 F.2d 888, 891 (2d Cir. 1968) (accommodation parties in ship-foreclosure proceeding); *Sun Oil Co. of Pennsylvania v. M/T CARLISLE*, 771 F.2d 805, 808 (3d Cir. 1985) (trade custom overruled because it violates Carriage of Goods by Sea Act, not because U.C.C. custom cannot be invoked in *in rem* proceeding); *Finora Co. v. Amitie Shipping, Ltd.*, 54 F.3d 209, 213-14 (4th Cir. 1995) (ship charter party) ("Absent reason to do otherwise, we prefer to adopt rules in admiralty that accord with, rather than diverge from, standard commercial practice."); *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 189 (5th Cir.), *cert. denied*, 469

U.S. 1037 (1984) (lease-purchase agreement for tugboat); *Union Planters Nat'l Bank v. World Energy Systems Assocs.*, 816 F.2d 1092, 1095 (6th Cir. 1987) (assignment under U.C.C. in case of maritime attachment under FED. R. CIV. P. SUPP. R. B(1)); *Interpool, Ltd. v. Char Yigh Marine, S.A.*, 890 F.2d 1453, 1459 (1989), *amended*, 918 F.2d 1476 (9th Cir. 1990) (security interest in vessel lease agreement); *Transatlantic Financing Corp. v. United States*, 124 U.S. App. D.C. 183, 363 F.2d 312 (1966) (whether Suez Canal closing made vessel charter party impossible of performance under U.C.C.).

In *Interpool, supra*, 890 F.2d at 1459, the Ninth Circuit addressed whether a ship-financing agreement was subject to the U.C.C. or federal admiralty law:

> We need not decide this difficult issue in this case. In maritime commercial transactions, the Uniform Commercial Code is taken as indicative of the federal common law of admiralty. [*See* GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 721 (2d ed. 1975).] On the issues before us, the relevant California statute, CAL. COM. CODE § 1201, is identical to its U.C.C. counterpart. In such circumstances, "it makes not the slightest difference whether [the U.C.C.] is applied directly as state law or indirectly or analogically as a statement of what the federal law of ship mortgages would be if there was a federal law of ship mortgages." *Id.* [i.e., GILMORE & BLACK at 721]

In *Clem Perrin, supra*, 730 F.2d at 188-89, the Fifth Circuit reached the same conclusion:

> Since the U.C.C. has been regarded as a source both for admiralty and federal common law, however, whether this dispute falls within admiralty or federal question jurisdiction is irrelevant. [Citations omitted.] Regardless of

> which ground of jurisdiction the case falls within, the law to be applied is the same.

The Fifth Circuit could more accurately have said it was applying state law because federal admiralty law does not reach the issue, as this Court explained when upholding the application of Oklahoma's breach-of-warranty law to a marine insurance policy in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316, 319 (1955).

These cases reveal that federal admiralty law defers to – and that courts sitting in admiralty apply – the Uniform Commercial Code as enacted by the relevant state. They demonstrate that the question posed by the petition – *whether title to goods under a negotiable bill of lading is governed by a federal-law or a state-law rule of decision* – remains the same whether the court's jurisdiction is based on an act of Congress (as respondent pleaded below) or on the federal admiralty and maritime jurisdiction (as the Brief in Opposition contends). That the question remains the same whether respondent alleges admiralty or commerce jurisdiction is shown by the following observation by this Court in a recent maritime case:

> Whatever might be the unifying theme of this aspect of our admiralty jurisprudence, it assuredly is *not* what the dissent takes it to be, namely, the principle that the States may not impair maritime commerce, see *post*, at 463-464, 467. In *Fireman's Fund*, for example, we did not inquire whether the breach-of-warranty rule Oklahoma imposed would help or harm maritime commerce, but simply whether the State had power to regulate the matter. The no-harm-to-commerce theme that the dissent plays is of

> course familiar to the ear – not from our admiralty repertoire, however, but from our "negative Commerce Clause" jurisprudence, see *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1988). No Commerce Clause challenge is presented in this case.

American Dredging Co. v. Miller, 510 U.S. 443, 452 n.3 (1994) (discussing *Fireman's Fund, supra*, 348 U.S. 310, and holding that Jones Act and federal admiralty law do not preempt Louisiana's law of *forum non conveniens*).

In litigation between private parties which does not touch on rights or duties of the United States, the federal courts will not apply federal common law. Thus, in *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956), this Court held that state law governs disputes between private litigants involving commercial paper (bonds) issued by the United States. In cases between private litigants, the federal courts will apply state law unless it significantly conflicts with a federal policy or interest. *See Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Neither the Ninth Circuit's decision nor respondent's Brief in Opposition suggests any federal policy or interest – involving either maritime or interstate commerce – that would in any way be infringed or impaired by the application of California's adoption of the Uniform Commercial Code to determine title to the goods covered by petitioner's negotiable bill of lading.

If the Court decides that this is a case of admiralty and maritime jurisdiction, the question presented by the petition will be the same as under the commerce jurisdiction exercised by the courts below: Is it a federal-law or a state-law rule of decision that governs title to goods under a negotiable document of title?

C. The "surrender-on-delivery" clause requires the person claiming the goods to demonstrate title.

The Brief in Opposition contends that the Ninth Circuit was right to enforce the bill's "surrender-on-delivery" clause. Neither respondent nor the Ninth Circuit realizes that the surrender clause restates the Uniform Commercial Code and makes its entitlement and negotiability requirements a part of the contract.

Under California's Uniform Commercial Code, the goods belong to the "person entitled under the document." CAL. U. COM. CODE § 7403(1); U.C.C. § 7-403(1). This means the person to whose order the document runs – in this case, to the order of Reveal, to whom petitioner made delivery – or to any other person who holds the bill *duly indorsed*. *See id.* § 7501(1); U.C.C. § 7-501(1). The "surrender-on-delivery" clause merely reiterates these rules: "One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods." Opp. Brief at 4, ¶ 4. By requiring a person who claims the goods to surrender the bill of lading "duly endorsed," the "surrender-on-delivery" clause makes the U.C.C. rules of entitlement and negotiability a part of the contract.

By accepting the thesis that respondent was entitled to recover damages for the ostensible breach of that clause even though respondent itself could not, and did not, surrender the bill of lading duly indorsed, the Ninth Circuit revealed its profound misunderstanding of the clause and of the U.C.C. rules the clause reiterates. Petitioner argued to the panel's deaf ears that respondent should not be heard to demand the goods, or damages for their "misdelivery," because Reveal had never indorsed the bill, and respondent was, therefore, not a "holder"

and could not comply with the "surrender-on-delivery" clause. As Professors Gilmore and Black explain, a carrier will be liable, if it does not take up the bill of lading, only to a person who is a *holder* of the bill:

> Just as the maker of a note effects its discharge only by payment to the holder, so the carrier will be discharged only by delivery to the holder of the bill. . . . The carrier which delivers goods without taking up and canceling its order bill of lading remains liable to anyone who has purchased the bill for value and in good faith, before or after the improper delivery, and even though the delivery was made to a person legally entitled to possession of the goods.

GILMORE & BLACK, LAW OF ADMIRALTY at 96-97 (citing U.C.C. § 7-403). Petitioner was not liable to respondent because the latter was not a good-faith purchaser and, thus, was not a "holder" of the bill.

By requiring any person who claims the goods to surrender the bill *duly indorsed*, the "surrender-on-delivery" clause – if properly construed – would have protected petitioner from respondent's claim, allowing refusal of respondent's demand for the goods because the bill had not been *duly indorsed* by Reveal, the order party. Contradicting California law and violating the precept of *Erie R. Co. v. Tompkins*, 364 U.S. 68 (1938), the Ninth Circuit created a federal rule of decision that requires carriers to deliver goods to claimants who possess documents of title running to the order of another person who has not duly indorsed the document. This unwarranted federal rule effectively destroys the negotiability of bills of lading by permitting a person who is not a holder – who does not hold the bill by negotiation – to claim the goods.

D. Conclusion

As it did in *O'Melveny & Myers v. FDIC*, 969 F.2d 744 (9th Cir. 1992), *rev'd*, 512 U.S. 79 (1994), the Ninth Circuit below has impermissibly fashioned a federal rule of decision where state law applies. Under the applicable law of California, respondent is not entitled to the judgment that the Ninth Circuit affirmed. Respondent fears "reduc[ing] the Nation's commerce to a chaotic shambles." Opp. Brief at 12. If chaos results, it will come not from a decision by this Court that state law governs documents of title, but rather from future applications of the Ninth Circuit's improper federal rule of decision, which contradicts the uniform state law embodied in Article 7 of the U.C.C.

Respectfully submitted,

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